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U.S. Department of Justice
Office of Information and Privacy

Vol. VII, No. 1
Winter 1986

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FOIA UPDATE

Surrogate FOIA Requests Increasing

In recent years, there has been a growing trend toward "surrogate" Freedom of Information Act requests—those made by persons or entities seeking federal records on behalf of others. This is a type of use—and perhaps abuse—of the FOIA that Congress hardly envisioned when it enacted the law in 1966.

Though there are various reasons for the increasing popularity of surrogate FOIA requests, their appeal in some instances lies in the anonymity that they allow the true requester. For example, a corporation may want such anonymity when it seeks information about a competitor. Similarly, a corporation or other organization which suspects that it may have come under federal scrutiny could seek to verify that through the FOIA, but might prefer not to do so directly. In other instances, the surrogate relationship might be more a matter of expediency.

Surrogate FOIA requesters generally fall into two distinct categories: the formal organization designed to serve as a "clearinghouse" for government information on a financially self-sustaining basis, and the individual who sets himself up as a surrogate requester for others.

FOIA officers Col. Charlie Y. Talbott, Phyllis De Piazza and Frank M. Machak of the Departments of Defense, Treasury and State, respectively, confer on the related FOIA requests filed by journalist Scott Armstrong.

"COTTAGE INDUSTRIES"

Perhaps the best known surrogate requesters are the commercial enterprises that have sprung up in the Washington, D.C. area to engage in the business of information acquisition and sale. Referred to by some as "cottage industries," these business entities serve a nationwide clientele consisting of any corporate or other type of customer willing to pay for compiled government information.

The largest such enterprise, at least as measured by current volume of requests, is FOI Services, Inc., which specializes in access to FDA information and uses the FOIA almost exclusively. Its FOIA request load is so great at the FDA that that agency bills it on a monthly basis, rather than for individual requests, and its monthly FOIA bill is sometimes as high as $4,000.

At the Defense Department, such enterprises are regarded as "data brokers," because they do little more than compile publicly available information pertaining to the defense procurement process and then sell it, at a considerable profit, to potential government contract bidders.

"THE NATIONAL SECURITY ARCHIVE"

Quite recently, a similar type of FOIA clearinghouse has been established with the extraordinary goal of obtaining and compiling federal records on matters of national security and foreign policy decisionmaking.

Under the name "The National Security Archive," this entity came into being in late 1985 with the avowed purpose to "identify, obtain, house, index, analyze, and disseminate contemporary, declassified and unclassified United States government documents pertaining to foreign, defense, intelligence and national security policy."

This unprecedented enterprise is the creation of former *Washington Post* reporter Scott Armstrong, who serves as its executive director and envisions it as a clearinghouse, or surrogate requester, for all FOIA requests made by journalists and academicians within its broad subject matter areas.

A fundamental aspect of its operation, according to the Archive's foundation grant proposal, will necessarily be the compilation of government records obtained under the FOIA for direct sale, as "document sets," to major research libraries on a regular subscription basis. Also planned to be sold, to an even wider range of subscribers, are indices of the

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. . . Requests on Behalf of Others

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records obtained by the Archive either for its own use or on behalf of others.

Although this enterprise has obtained start-up foundation funding, as well as additional support from the Brookings Institution, its plans call for it to be "financially self-sufficient through sales of document sets and hard-bound and computerized indices of the document sets" within a year. Armstrong even envisions that the Archive's "client" list will include the very federal agencies from which the records are obtained.

While it remains to be seen exactly how this new FOIA request enterprise will affect the functioning of federal agencies in its particularly sensitive subject matter areas, many agency officials are already quite concerned about its potential impact.

They point to the more than 2,000 FOIA requests made by Scott Armstrong during recent years and to the enormous difficulties that they have posed for agencies such as the Departments of State, Defense and Treasury. Not only have Armstrong's requests been numerous and wide-ranging, they have been so massive in some instances as to clog agency FOIA processing channels to the detriment of other requesters.

One such request, for example, sought no fewer than 24 linear feet of Defense Department records, most of which were highly sensitive and classified.

Moreover, because the matter was brought to court by *The Washington Post* (upon whose behalf Armstrong had initially made the request), the Defense Department was required to laboriously prepare a *Vaughn* index of all the withheld materials. And then after *The Washington Post* chose to litigate further over only four of the records, Armstrong himself sought to intervene in the case to continue contesting all 24 linear feet of records.

Also of great concern in the case of any organized clearinghouse for federal information is the risk that various items of seemingly nonsensitive information can be pieced together to reveal a sensitive larger picture. When such a large-volume FOIA requester as Armstrong--or potentially his Archive—blankets several agencies with related requests, that risk increases considerably.

Indeed, Armstrong has publicly acknowledged that he has on numerous occasions engaged in the practice of filing duplicative requests for the same document at multiple agencies, or components within an agency, with the hope that one might release more information than the others. In the face of such an approach, particularly by a well-organized and wide-ranging FOIA requester, the careful coordination of agency responses is essential. (See "On Agency Practice" box on this page.)

INDIVIDUAL SURROGATES

Finally, there are the individuals who, for one reason or another, make FOIA requests on behalf of other persons. This practice is most common among prison inmates, who perhaps see it as merely an extension of the traditional "jailhouse lawyer" role. Some prisoners may do this on a "fee" basis, while others seem to be satisfied with the burdens they are able to inflict upon federal law enforcement agencies, including their jailers.

The most ubiquitous such surrogate FOIA requester in recent years has been Michael C. Antonelli, a long-term inmate at a federal penitentiary in the midwest who has served time for conspiracy, bank fraud, weapons violations and involvement in a series of bombings.

During the past few years, Antonelli has made hundreds of FOIA requests on behalf of other persons to various federal law enforcement agencies, with the written consents of the third parties.

When he is dissatisfied with an agency's response to such a request, Antonelli takes his surrogate role one step further and brings a FOIA lawsuit against the agency, again in his own name. Presently before the courts are dozens of such "Antonelli" FOIA cases, including many which raise an issue of his entitlement to file such actions without paying court fees, on a claimed *in forma pauperis* (personal indigency) basis.

In fact, the Department of Justice recently challenged the veracity of Antonelli's *in forma pauperis* applications in more than two dozen cases in which he was evidently suing on behalf of other persons with their financial support.

This extraordinary challenge, which was based upon facts about Antonelli's financial arrangements unearthed by Department of Justice attorneys, has led to an unprecedented series of court rulings dismissing Antonelli's lawsuits, *with prejudice*, as a sanction for his misrepresentations. In upholding the principle of these rulings on appeal, Acting Chief Circuit Judge Patricia M. Wald even went so far as to speak pointedly of Antonelli's "fraud." *Antonelli v. DEA*, No. 85-6118, slip op. at 3 (D.C. Cir. Feb. 20, 1986).

Agency Coordination Essential

Sound administrative practice under the FOIA calls for agencies to consult with one another and to coordinate their responses wherever the circumstances warrant.

This general rule, however, becomes an imperative one when agencies are confronted with an extensive series of related FOIA requests such as those filed by The National Security Archive or its affiliated individuals, particularly Scott Armstrong. In keeping with its statutory responsibility to promote proper and uniform FOIA practices by all agencies, the Office of Information and Privacy makes special efforts to coordinate agency responses to such extraordinary FOIA requests.

On Agency Practice

Over the past year, OIP has on several occasions gathered the principal FOIA officers of the agencies processing Armstrong-related requests in order to facilitate the coordination of individual agency responses to them. A central concern at these meetings has been, and continues to be, the proper application of the FOIA's fee and fee waiver provisions to these requests; OIP makes every effort to ensure particularly uniform agency responses in this area.

Thus, agencies should take pains to coordinate their related FOIA activities to the greatest extent possible, especially in the case of large-scale requests, and OIP attorneys stand available to aid this coordination process. Any question regarding Armstrong-related requests or fee issues should be directed to OIP's fee and fee waiver specialist, staff attorney Joan S. van Berg, at (FTS) 724-6683.

U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

OIP Guidance

Privacy "Glomarization"

All federal agencies realize that the processing of third-party requests under the Freedom of Information Act—requests for records on other named individuals—can involve sensitive personal privacy considerations. But when such requests are made to a federal law enforcement agency, or to any agency which maintains investigatory files, the special privacy considerations involved can call for the careful utilization of a special FOIA response.

Specifically, a FOIA request seeking records which would indicate that a particular political figure, prominent businessman or even just an ordinary citizen has been the subject of a law enforcement investigation may require an agency to flatly refuse to confirm or deny whether such records exist. Such an extraordinary response can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. *See FOIA Update*, Spring 1983, at 5. This response, colloquially known as a "Glomar denial" or "Glomarization," was first judicially recognized in the national security context, *see Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*), but it surely is applicable elsewhere.

STIGMATIZING CONNOTATION

The application of "Glomarization" in the privacy context is appropriate because disclosure of the mere fact that an individual is mentioned in an agency's law enforcement files carries a stigmatizing connotation, one certainly cognizable under FOIA Exemption 7(C), 5 U.S.C. §552(b)(7)(C). *See, e.g., Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 865 (D.C. Cir. 1981) ("The disclosure of [the fact that specific individuals were the subjects of a criminal investigation] would produce the unwarranted result of placing the named individuals in the position of having to defend their conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings."); *Baez v. Department of Justice*, 647 F.2d 1328, 1338 (D.C. Cir. 1980) ("There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation."); *see also Miller v. Bell*, 661 F.2d 623, 631-32 (7th Cir. 1981) (identities of individuals merely mentioned in law enforcement records protected), *cert. denied sub nom. Miller v. Webster*, 456 U.S. 960 (1982); *Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977) (same).

Indeed, only through the consistent application of this masked response to third-party requests, regardless of whether responsive records do actually exist, can the privacy of those who are in fact mentioned in law enforcement files be protected. For example, if an agency provided a "no records" response to its first nine requests for third-party investigatory files, it could not then respond to the tenth request—where records in fact do exist—by "refusing to confirm or deny" without, in effect, disclosing the very fact sought to be protected. *See, e.g., Antonelli v. FBI*, 721 F.2d 615, 616-19 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2399 (1984); *Rushford v. Civiletti*, 485 F. Supp. 477, 478-80 (D.D.C. 1980), *aff'd mem. sub nom. Rushford v. Smith*, 656 F.2d 900 (D.C. Cir. 1981); *see also Gardels v. CIA*, 689 F.2d 1100, 1104-06 (D.C. Cir. 1982) (operation of "Glomarization" in national security context).

COGNIZABLE PRIVACY INTEREST

Analytically, though, use of the "Glomarization" approach under Exemption 7(C) is justified only when it is determined that there is a cognizable privacy interest at stake and that there is insufficient public interest in disclosure to outweigh it. *See, e.g., Common Cause v. National Archives & Records Service*, 628 F.2d 179, 184-86 (D.C. Cir. 1980) (balancing required by Exemption 7(C) even for identities of uncharged subjects of law enforcement investigation). In this regard, it should be remembered that there are three circumstances in which the fact that an individual is mentioned in a law enforcement file does not give rise to a privacy interest cognizable under Exemption 7(C).

First, there is the principle that deceased persons are possessed of no protectible privacy interests under the FOIA; therefore, when an agency is aware of the record subject's death, either because the requester has provided proof of this fact or because it is reflected in the responsive records, neither of the FOIA's privacy exemptions may be invoked. *See, e.g., Tigar & Buffone v. United States Department of Justice*, Civil No. 80-2382, slip op. at 9-10 (D.D.C. Sept. 30, 1983); *Diamond v. FBI*, 532 F. Supp. 216, 227 (S.D.N.Y. 1981), *aff'd on other grounds*, 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1070 (S.D.N.Y. 1974), *on motion for reconsideration*, 401 F. Supp. 1206, 1210 (S.D.N.Y. 1975); *see also FOIA Update*, Sept. 1982, at 5. *But see also Kiraly v. FBI*, 728 F.2d 273, 277-79 (6th Cir. 1984). Note, however, that information about a decedent may, in some very unusual cases, also directly implicate the privacy interests of a relative or close personal associate who does qualify for FOIA exemption protection. *See, e.g., Price v. United States Department of Justice*, Civil No. 84-330-A, slip op. at 6-7 (M.D. La. June 25, 1985).

Second, if the third-party subject of a request has provided the requester with a waiver of his privacy rights, then privacy exemptions cannot be invoked on his behalf as regards that requester. Because of the strict nondisclosure requirements of the Privacy Act of 1974, 5 U.S.C. §552a(b), it is essential that such authorizations be set out specifically in writing. *See Perry v.*

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. . . Handling Third-Party Requests

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FBI, 759 F.2d 1271, 1276 (7th Cir. 1985); *Taylor v. Orr*, Civil No. 83-0389, slip op. at 5 n.6 (D.D.C. Dec. 5, 1983).

Third, if the federal government has already *officially* confirmed that the third party was or is the subject of a federal investigation—usually by indicting and prosecuting him—then the very fact that an agency maintains a corresponding investigatory file cannot be regarded as a "private" fact about that person. *See, e.g., Heimerle v. United States Department of Justice*, Civil No. 83-1944-(MEL), slip op. at 5 (S.D.N.Y. Mar. 4, 1985) ("[I]ndividuals whose identities were withheld can no longer claim privacy interests with respect to the subject matter in question due to their public participation in criminal proceedings."); *Congressional News Syndicate v. United States Department of Justice*, 438 F. Supp. 538, 544 (D.D.C. 1977) (no privacy protection for fact of "prior convictions"); *Tennessean Newspapers, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975) (ordering disclosure of records reflecting recent arrests and indictments). It is possible, though, that under some circumstances a lengthy passage of time may be found to have effectively removed such a fact from the "public domain." *Cf. Roshto v. Herbert*, 413 So. 2d 927, 931-33 (La. App. 1982) (common law cause of action for invasion of privacy recognized for recounting of circumstances of 25-year-old criminal conviction); *Briscoe v. Reader's Digest Association*, 93 Cal. Rptr. 866, 875, 483 P.2d 34, 43 (Cal. 1971) (same for 11-year-old criminal conviction). *But cf. Montesano v. Donrey Media Group*, 668 P.2d 1081, 1088 (Nev. 1983) (no such cause of action recognized regarding details of 14-year-old criminal conviction).

BALANCING THE INTERESTS

Once a cognizable privacy interest is found to exist, the next analytical step in the "Glomarization" process is to review all responsive records to determine if there is any public interest in disclosure which might outweigh the individual's privacy interest. To be sure, the public interest in disclosure would have to be particularly acute in order to override the privacy considerations of an individual who would be exposed as a subject of a criminal law enforcement investigation under circumstances which he would not be afforded the benefit of a public trial to defend his reputation. *See, e.g., Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d at 863-66 (identities of those investigated but not charged must be protected unless "exceptional interests militate in favor of disclosure"); *Congressional News Syndicate v. United States Department of Justice*, 438 F. Supp. at 545.

Although it has sometimes been suggested that an individual's status as a public figure should diminish the extent to which his privacy is protected, *see, e.g., Common Cause v. National Archives & Records Service*, 628 F.2d at 866; *but see also FOIA Update*, Sept. 1982, at 5, the FOIA case law firmly supports use of the "Glomar denial" for requests seeking investigatory records which would reflect uncharged criminal misconduct by even such prominent individuals. *See, e.g., Knight Publishing Co. v. United States Department of Justice*, Civil No. C-C-84-510-P, slip op. at 1-2 (W.D.N.C. Mar. 28, 1985) (governor, lieutenant governor and attorney general of North Carolina); *Ray v. United States Department of Justice*, Civil No. 3-84-1234, slip op. at 2-3 (M.D. Tenn. Nov. 30, 1984) (state senator); *Rushford v. Civiletti*, 485 F. Supp. at 479-81 (federal judges).

On the other hand, there is a weighty public interest compelling disclosure of records which reflect formal and final agency determinations of official misconduct by senior government employees. *See, e.g., Cochran v. United States*, 770 F.2d 949, 957 (11th Cir. 1985) ("information relating to a misappropriation of government funds . . . by a high level government official qualifies as a textbook example of information the FOIA would require to be disclosed"); *Stern v. FBI*, 737 F.2d 84, 93 (D.C. Cir. 1984) (high-level FBI official censured for deliberate misrepresentation); *Sullivan v. Veterans Administration*, 617 F. Supp. 258, 260-61 (D.D.C. 1985) (senior official reprimanded for misuse of government vehicle and failure to report accident); *see also Bast v. United States Department of Justice*, 665 F.2d 1251, 1255-56 (D.C. Cir. 1981) ("public importance of judicial impartiality outweighs the privacy interest" of federal judge in particular case).

RECORD SEARCH AND REVIEW

Thus, in order to properly respond to a FOIA request for law enforcement records pertaining to a third party, it is necessary that an agency search for and conduct a sufficient review of all responsive records to determine whether they reflect (1) the death of the subject, (2) an official acknowledgement of the investigation, or (3) a public interest in disclosure sufficient to override the subject's privacy interests. The cases which have expressly addressed the logical requisites of Exemption 7(C) "Glomarization" have made these agency requirements clear. *See Gilday v. United States Department of Justice*, Civil No. 85-292, slip op. at 5-10 (D.D.C. July 23, 1985) (agency must conduct record search and review even in "Glomarization" situation); *Shaw v. FBI*, 604 F. Supp. 342, 344-45 (D.D.C. 1985) (same); *see also Ely v. FBI*, 781 F.2d 1487, 1491-94 (11th Cir. 1986) (public and *in camera* affidavit requirements).

Prior to commencing such a search and review, it is of course permissible for an agency to seek additional information from the requester to assist in resolving questions of waiver, the subject's death, official acknowledgement and any public interest in disclosure. In conducting its review, an agency may assess search fees for its efforts expended in locating the responsive files, but not for the document review necessary to make the required determinations. Obviously, any interim response soliciting a requester's promise to pay search fees (in those instances in which such fees exceed the agency's minimum fee threshold) should carefully explain the agency's "Glomarization" policy, including the fact that it is quite possible that the agency ultimately will be unable to acknowledge the existence of any records responsive to such a request.

CONCLUSION

In sum, the legitimate personal privacy interests of individuals referenced in law enforcement files can be protected only through the uniform application of the "Glomarization" principle to third-party requests. Such a response is appropriate only after the agency has conducted a search and record review, together with a careful analysis and weighing of all personal privacy and public interest considerations. Where an agency follows this procedure, it will be able to defend its use of this extraordinary FOIA position.

***Akron Standard Division of Eagle-Picher Industries v. Donovan*, 780 F.2d 568 (6th Cir. 1986).**

In a troubling decision restricting the coverage afforded by Exemption 7(C), a divided panel of the Sixth Circuit Court of Appeals has refused to protect candid discussions in an OSHA investigatory report that "could be interpreted to reflect unfavorably" upon a "whistleblowing" former employee of the requester. The panel majority strangely viewed Exemption 7(C) as protecting only information involving "'intimacy' or where revelation . . . might subject the party to 'physical danger' . . . or to 'potential retribution.'" Further, even though the subject of the request was a relatively low-level company employee, it oddly analogized his situation to that of Exemption 6 precedents which had refused "to shelter substandard performance" of high-level federal employees. Despite a vigorous dissent on this issue, the panel also concluded that the fact that the employee's performance was at issue in a public proceeding left "little remaining" to be protected.

On a separate issue, the court of appeals also refused to follow the thrust of *L&C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 925 (11th Cir. 1984), and held that employee-witness statements could not be protected under Exemption 7(D) where the agency had inadvertently disclosed those identities, even though this would permit the requester to connect the individuals who gave statements to the content of their statements. A petition for rehearing *en banc* on both issues is pending.

***United Technologies Corp. v. NLRB*, 777 F.2d 90 (2d Cir. 1985).**

Ignoring the adverse minority ruling of *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985), *reh'g en banc denied*, No. 82-4719 (9th Cir. May 1, 1985), the U.S. Court of Appeals for the Second Circuit has specifically rejected any narrow "potential witness" exception to Exemption 7(D) protection. At issue was the name of an employee who gave the NLRB information in confidence about a labor dispute, even though he "*could have* been called or *might yet* be called as a witness" (emphasis in the opinion). In upholding Exemption 7(D)'s applicability to such a source, the Second Circuit held that "the proper interpretation of the term 'confidential source' includes an informant who is promised or reasonably expects confidentiality unless and until the agency needs to call him as a witness at trial." Noting further that the requester "should not be permitted to obtain [indirectly] what Exemption 7(D) does not entitle it to obtain directly," it extended Exemption 7(D) protection to the NLRB agent who received the information, to preclude the requester from questioning him. The court of appeals additionally refused to find that the NLRB had waived the exemption's protection in releasing the identities to counsel for the labor union, concluding that "the privilege belongs to the beneficiary of the promise of confidentiality and continues until he or she waives it."

***Wolfe v. HHS*, Civil No. 85-1033 (D.D.C. Nov. 20, 1985).**

In a decision with potentially far-reaching import, U.S. District Court Judge John H. Pratt has ruled that agency records which reveal the "status" of proposed regulations are not protected by the deliberative process privilege under Exemption 5. Specifically at issue was a log indicating the date that action on certain regulations had been completed by the Food and Drug Administration, and also their status as they were pending review by either the Secretary of Health and Human Services or the Office of Management and Budget. Judge Pratt characterized the information contained in the log as purely factual in nature and, relying on *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), he ordered its disclosure. In so ruling that a "simple request for the *status* of a pending regulation does not implicate *what is* or *is not* being recommended" (emphasis in the opinion), Judge Pratt refused to regard the log as a protectible key element of the FDA's deliberative process, and he rejected as "speculation" the government's fears that disclosure of such logs would open up agency decisionmakers to harassment from interested parties who would lobby them to make particular or hasty decisions. The Solicitor General has authorized an appeal; pending its outcome, this decision is not being followed.

***Gulf Oil Corp. v. Brock*, 778 F.2d 834 (D.C. Cir. 1985).**

In a "reverse" FOIA suit brought by Gulf Oil seeking to prevent the Department of Labor from releasing its 1973 affirmative action plan, the D.C. Circuit reversed a lower court decision which had permanently enjoined disclosure of that plan as well as all "substantially similar" documents. The D.C. Circuit held that the injunction order was moot as to the 1973 plan because the FOIA requester had withdrawn its request after experiencing eleven years of litigation delays. It also found that intervening events during those eleven years—particularly changes in FOIA case law, including the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and the corresponding changes in the agency's regulations—had "removed the [case's] ripeness with respect to the alleged 'similar' documents," thereby precluding judicial review. Finally, the court of appeals declared that the permanent injunction was overbroad because it forever forbade agencies "from releasing *any* information in *any* affirmative action plan" (emphasis in the opinion), which was an improper grant of prospective relief.

***Pennsylvania Department of Public Welfare v. HHS*, 623 F. Supp. 301 (M.D. Pa. 1985).**

In an opinion significant as the first thorough judicial analysis of the attorney work-product privilege under Exemption 5 since the Supreme Court's decision in *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983), U.S. District Court Judge R. Dixon Herman has ruled that "with regard to the material appropriately withheld pursuant to the work-product privilege, release of segregable factual information is not required." Judge Herman found that the factual discussions contained in the eleven work-product documents before him were fully protected from disclosure under Exemption 5 because, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, factual material prepared by a party "in anticipation of litigation" is discoverable only upon a showing of substantial need. "Under the FOIA, then," he continued, "such factual material is exempt from disclosure, even if segregable, because it is not 'normally' or 'routinely' discoverable in a civil context." *Accord FOIA Update*, Fall 1984, at 6. He concluded by specifically contrasting the breadth of this privilege with that of the deliberative process privilege, which generally does not protect pure facts.

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Should a first-party access request which cites only the Privacy Act be processed under the Freedom of Information Act as well?

Yes. Not all federal record requesters are knowledgeable enough to cite the statutory authority applicable to their access requests. Particularly in the case of first-person requests, in which possibly unsophisticated persons seek access to records on themselves, agencies are expected to honor a requester's obvious intent. *Cf. Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985); *accord Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (requiring federal courts to construe *pro se* submissions under "less stringent standards"). Moreover, were an agency to process an access request which cites only the Privacy Act (or, for that matter, no statute at all) under the Privacy Act alone, it would likely have to reprocess that request under the FOIA once the requester (or, ultimately, a court) realized the narrowness of the agency's action.

It is therefore good policy for agencies to treat all first-party access requests as FOIA requests (as well as possibly Privacy Act requests), regardless of whether the FOIA is cited in a requester's letter. Indeed, Congress specifically urged this policy when it clarified the substantive relationship of the FOIA and Privacy Act in the Central Intelligence Agency Information Act, Pub. L. 98-477 (Oct. 15, 1984). *See* H.R. Rep. 98-726 Pt. 2, 98th Cong., 2d Sess. 16-17, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3790-91. To the extent that the recent Privacy Act guidance issued by the Office of Management and Budget suggests otherwise—see OMB Memorandum For The Senior Agency Officials For Information Resources Management (May 25, 1985) at 8-9—it should be disregarded on this matter of FOIA policy. *See* 5 U.S.C. §552(d) (establishing Justice Department FOIA policy responsibility).

Is an agency compelled to release all portions of an awarded government contract under the FOIA?

No, not necessarily. Although general policy considerations strongly favor the disclosure of awarded contracts to permit the public "to evaluate the wisdom and efficiency of federal programs and expenditures," *Racal-Milgo Government Systems, Inc. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981), an agency is certainly not precluded from withholding portions of an awarded contract where warranted under Exemption 4. The few courts that have been confronted with FOIA requests for data contained in awarded contracts have evaluated those documents just as they would any document containing business information—by determining if disclosure would cause one of the harms cognizable under Exemption 4. *See Racal-Milgo Government Systems, Inc. v. SBA, supra* (disclosure of unit prices contained in contract for computer equipment would not cause submitter substantial competitive harm or impair agency's ability to obtain similar data in the future); *J.H. Lawrence Co. v. Smith*, Civil Nos. 81-2993, 82-0361, slip op. at 8-9 (D. Md. Nov. 10, 1982); *Sperry Univac Division v. Baldrige*, 3 GDS ¶83,265, at 84,052 (E.D. Va. 1982), *appeal dismissed*, No. 82-1723 (4th Cir. Nov. 22, 1982). *Cf. Goldstein v. ICC*, Civil No. 82-1511, slip op. at 6 (D.D.C. July 31, 1985) (disclosure of names of shippers in rail carrier contracts required to be filed with agency would cause submitter substantial competitive harm). Thus, a standard Exemption 4 analysis should be employed in making FOIA disclosures of information contained in awarded government contracts, with particular attention paid to whether the data requested relates to the contract price, *see, e.g., AT&T Information Systems, Inc. v. GSA*, Civil No. 85-1197, slip op. at 16 (D.D.C. Feb. 6, 1986) ("strong public interest in release of component and aggregate prices in Government contract awards"), and also to whether disclosure is required by some other statute or regulation, *see, e.g., FOIA Update*, Fall 1984, at 4 (data disclosable under the Federal Acquisition Regulation cannot be withheld under the FOIA). On the other hand, the existence of an unresolved bid protest could warrant a delay in agency disclosure. *See, e.g., Racal-Milgo Government Systems, Inc. v. SBA*, 559 F. Supp. at 7 (disclosure of unit prices stayed pending outcome of bid protest).

Are the names of individuals who write letters to government officials protectible under Exemptions 6 and/or 7(C) of the FOIA?

Yes, in most instances. In general, the identity of one who writes to a government official expressing a personal opinion may be withheld under one of the FOIA's personal privacy exemptions. Letter writers usually have some expectation of privacy when expressing their personal opinions, *see Holy Spirit Ass'n v. FBI*, 683 F.2d 562, 564 (D.C. Cir. 1982) (MacKinnon, J., concurring) (private citizen has "expectation that when he provides (usually voluntarily) information to the government he will not be damaged in his person or reputation by disclosure of the source"), and there is "a strong public interest in encouraging citizens to communicate their concerns . . . to their elected representatives." *Holy Spirit Ass'n v. Department of State*, 526 F. Supp. 1022, 1034 (S.D.N.Y. 1981). *Cf. Brant Construction Co., Inc. v. EPA*, 778 F.2d 1258, 1264 (7th Cir. 1985) (writer of unsolicited letter can be confidential source under Exemption 7(D)). *But see Powell v. Department of Justice*, Civil No. C82-0326-MHP, slip op. at 5 (N.D. Cal. Mar. 27, 1985) (individuals do not retain a privacy interest when writing to public officials) (appeal pending).

Indeed, providing protection to one who volunteers information to the government by letter is entirely consonant with the well-established principle that the identities of persons cooperating in government investigations are protectible under Exemption 7(C). *See, e.g., New England Apple Council v. Donovan*, 725 F.2d 139, 144-45 (1st Cir. 1984); *Iglesias v. CIA*, 525 F. Supp. 547, 563 (D.D.C. 1981); *Church of Scientology v. Department of State*, 493 F. Supp. 418, 421 (D.D.C. 1980). On the other hand, the identity of a letter writer should be released where there is an indication that there is no expectation of privacy (*e.g.*, where the letter has been distributed widely), *cf. Brant Construction Co.*, 778 F.2d at 1264, that the individual is writing on behalf of an organization and thus is not expressing personal views, or that the letter is itself a request for information under the FOIA, *see FOIA Update*, Winter 1985, at 6. Of course, even where the identity of the writer is protected, the substance of the correspondence should be released insofar as the substance itself is not identifying or otherwise exempt.

FOIA Focus: John D. Heine

In addition to the major federal departments, the FOIA also applies to various regulatory agencies—independent commissions empowered to regulate distinct activities of American industry. Typically, these agencies are required by law to disseminate certain types of records freely to ensure that the general public is routinely informed about matters of national concern such as the use of nuclear energy, the securities market or interstate communications.

Even before the FOIA was enacted, these agencies had established public reading rooms where both individuals and businesses had access to the agencies' public filings and where a variety of document disclosure services were provided at nominal cost. Under the FOIA, however, anyone may request access to the traditionally non-public files of a regulatory agency, such as internal correspondence or investigatory files. As a result, these agencies have had the challenging task of incorporating their FOIA responsibilities into existing disclosure programs.

* * * * *

"In my opinion, the Securities and Exchange Commission has a propensity to disclose information, since that is its business," says John D. Heine, chief of the SEC's Freedom of Information and Privacy Act Branch. "Most FOIA requesters are interested in obtaining financial information about businesses and corporations rather than information about the inner workings of the SEC."

The SEC was established in the wake of the stock market crash of 1929. "The idea was that the government should ensure that enough information got out to the investing public so that people could make informed decisions about investing in companies," Heine notes.

Over eleven thousand corporations that issue stock publicly are required to file a variety of reports with the SEC. In addition, all brokerage firms, investment advisers and investment companies must register with the Commission.

A sizable portion of the general public has a great interest in the public filings of the SEC. "You have to remember that the Commission receives information that people use to make money," explains Heine.

To fulfill its broad public disclosure mandate, the SEC has maintained a public reference room at its headquarters in

Washington, D.C. since 1935. It presently has similar facilities in its New York and Chicago regional offices. It also contracts with a copying company whose on-site and off-site staff provides public users with a wide range of information services—including microfiche and magnetic tape—at a nominal cost.

"Often when we receive FOIA requests," says Heine, "we refer people to the public reference room, because so many of our documents are publicly available."

Last year, the Commission received nearly two thousand FOIA requests for agency records. Approximately forty of these were also Privacy Act requests submitted by persons who believed they were or might have been under investigation by the SEC for possible violation of security laws.

"Of course," remarks Heine, "even though we're a disclosure-oriented agency, we have to be careful to protect sensitive investigatory data in our own files." In this regard, the SEC is like any other federal agency with investigatory responsibilities.

Heine's office handles all FOIA and Privacy Act requests received at the Commission's Washington, D.C. headquarters, as well as those received at each of its fifteen regional and branch offices.

In his office, there are two technical assistants who are responsible for tracking and processing correspondence, plus seven research assistants who are responsible for locating and reviewing all requested records and drafting responses.

In making their disclosure determinations, Heine's research assistants consult extensively with the various operating divisions and support offices of the SEC. When confidential business information is involved, as is often the case at a regulatory agency, the business submitter is contacted so that its disclosure objections can be obtained, analyzed and acted upon.

"I really can't overemphasize how much I rely on the dedication, expertise and judgment of the research assistants," observes Heine. "They make their decisions on a page-by-page basis. I just review what they do."

* * * * *

Heine was born and raised in St. Louis, Missouri. He attended Drury College in Springfield, Missouri, and graduated in 1968 with a bachelor's degree in political science.

After graduation, he entered the United States Army and served two years in northern Bavaria, stationed in a small village bordering on East Germany.

Upon his discharge from the Army, Heine decided to resume his academic pursuits. He received a fellowship in political science from the University of Chicago and spent the next five years engaged in graduate studies at that university.

After receiving an offer of employment at the SEC, Heine consulted one of his professors and received very specific advice and encouragement about information disclosure work.

"He was born in Nazi Germany and he had firsthand knowledge of the enormous impact of information in a bureaucracy," Heine explains. "He was very concerned about our government's information policies and practices and had great respect for the SEC."

In 1975, Heine accepted a position as a FOIA research assistant at the SEC in Washington, D.C. and soon found that he derived great satisfaction from such work. Four years later, he was promoted to chief of the Freedom of Information and Privacy Act Branch, a position which he still enjoys.

"Information is central to decision-making and politics," concludes Heine, ever the student of government and political science. "If you see how information is transmitted, you understand how things work in a bureaucracy."

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LEI Cutbacks

At this time of budgetary constraints throughout the federal government, FOIA training programs will not be unaffected.

For the past four years, most governmentwide FOIA training has been conducted by the Office of Information and Privacy under the auspices of the Justice Department's Legal Education Institute. However, due to sudden budget cutbacks, the Legal Education Institute has sharply curtailed those FOIA training seminars for the immediately foreseeable future.

Consequently, the Office of Information and Privacy has undertaken to provide governmentwide FOIA training directly, using its own resources. These programs will be coordinated by OIP's training officer, senior attorney Phyllis L. Hubbell, and will be provided at no cost at available locations in the Washington, D.C. area.

The first such OIP training session will be the Advanced FOIA Seminar, for which registration is limited to 40-45 participants. It will be held on June 4, 1986, at the Department of Labor Headquarters Building in Washington, D.C. An introductory FOIA seminar as well as a new "Update" training session are also planned to be held in the same location before the end of the summer.

Additionally, in light of the Legal Education Institute's extraordinary constraints at this time, OIP attorneys will be providing specialized FOIA training to individual agencies upon request. Further information about these new developments in FOIA training can be obtained from Phyllis Hubbell at (FTS) 724-7341.

FOIA Training Opportunities

DEPARTMENT OF JUSTICE

Office of Information and Privacy: Advanced Seminar on the Freedom of Information Act, **June 4**, U.S. Department of Labor Headquarters Building, Washington, D.C. Contact: Phyllis L. Hubbell, (FTS) 724-7341. No charge.

OPM

Atlanta Region Training Center: Freedom of Information/Privacy Acts Workshop, **June 10-11**, Atlanta, GA. Contact: Hazel L. McGarr, (FTS) 242-5193. Cost: $170.

Chicago Region Training Center: Freedom of Information/Privacy Act, **May 20-21**, Federal Building, Twin Cities, MN; **June 3-4**, Federal Building, Dayton, OH. Contact: Charles W. Cranford, (FTS) 353-3294. Cost: $150.

Dallas Region Training Center: Freedom of Information/Privacy Act, **April 30-May 1**, Central Expressway Inn, Dallas, TX. Contact: Yvonne Lindholm, (FTS) 729-8241. Cost: $180.

Center for Communications and Administrative Management, Administrative Management Training Institute: Successful Implementation of the Freedom of Information Act and the Privacy Act, **May 14-15**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-5600. Cost: $225.

Center for Communications and Administrative Management, Administrative Management Training Institute: FOIA and PA Workshop for Administrative and Secretarial Personnel, **June 19-20**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-5600. Cost: $225.

USDA GRADUATE SCHOOL

The Freedom of Information Act and the Privacy Act, Monday evenings, 6–9 p.m., **April 7–June 16**, 19th and Virginia Ave., N.W., Washington, D.C. Contact: Kimberly Ferrara, (FTS) 447-5885. Cost: $81.

Information Access Laws, **May 28-29**, 600 Maryland Ave., S.W., Washington, D.C. Contact: Rex Schuler, (FTS) 447-7124. Cost: $185.

The Freedom of Information Act and the Privacy Act, a correspondence program available to begin any time during the Spring Quarter. Contact: Correspondence Study Program Division, (FTS) 447-7123. Cost: $128 (if paid by check or charge) or $134 (if paid by purchase order).

FOIA UPDATE

Published quarterly by the Office of Information and Privacy, U.S. Department of Justice, Washington, D.C. 20530, (FTS) 724-7400.

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U.S. Department of Justice
Office of Information and Privacy

Vol. VII, No. 2
Spring 1986

FOIA UPDATE

House Advances Limited FOIA Bill

Putting aside efforts toward broad FOIA reform legislation, a subcommittee of the United States House of Representatives has moved toward passage of a limited FOIA reform bill dealing with business information protection procedures only.

On May 21, such a bill was introduced by Rep. Glenn English (D. Okla.), chairman of the House Government Opera-

Legislative Update

tions Committee's Subcommittee on Government Information, Justice and Agriculture, together with the subcommittee's ranking minority member, Rep. Thomas A. Kindness (R. Ohio).

Entitled the "Freedom of Information Act Amendments of 1986" (H.R. 4862), the bill would require by law that submitters of business information receive predisclosure notification and objection rights and also would establish a *de novo* review standard for any "reverse" FOIA lawsuit brought to prevent business information disclosure. Its provisions are quite similar to those contained in the more comprehensive FOIA reform bill (S. 774) that was passed by the Senate more than two years ago. (See *FOIA Update*, Summer 1983, at 2.)

The bill's introduction came after the subcommittee and the Department of Justice were unable to achieve an agreement on a broad package of FOIA reform amendments along the lines of S. 774, one that would contain new law enforcement protections as well as various procedural provisions. Efforts toward such an agreement were begun late last year and led to the preparation of a new comprehensive FOIA reform proposal that was circulated widely for reaction and comment during the months of March and April.

However, this proposal encountered strong opposition from many federal agencies which objected to many of its new procedural requirements that would place added administrative burdens on

them, particularly during this time of extraordinary federal budgetary constraints. Of greatest concern were the proposal's expedited access provision, which held the potential for being more burdensome than a similar provision of S. 774, and a number of new record-keeping requirements that would have been imposed upon the process of FOIA administration.

At the same time, the subcommittee staff found it difficult to firm up a consensus of support for the proposal among the various press and public interest groups involved in the process, particularly the press organizations that have most vocally opposed any FOIA reform efforts over the years. A pivotal impediment to the reaching of an agreement was the insistence of the press groups, near the end of the discussion process, that the expedited access provision be interpreted in such a way as to apply almost automatically to any journalist working on a deadline—which would have presented totally unacceptable difficulties to agencies.

Consequently, the subcommittee determined to narrow its focus to the less controversial subject of business information procedural provisions, which a coalition of business groups has been pressing to advance ever since FOIA reform efforts were commenced several years ago. In introducing such a limited measure, Rep. English stated that "the attempt to write a broader bill must be shelved for now."

A hearing on the business procedures bill was scheduled to be held by the subcommittee on June 5, with the expectation that only prompt action on the bill could ensure its progress through the legislative process at this stage of the legislative session. Because such business provisions have been the subject of strong opposition from at least one major public interest organization in the past, the likelihood of the bill's passage is as yet uncertain.

As to the Justice Department's efforts to obtain a broader package of FOIA reform amendments, Assistant Attorney General for Legal Policy Stephen J. Markman has stated: "The Administration remains committed to pursuing broad FOIA reform, particularly in vital law enforcement areas, and it will not allow its commitment to this important goal to be lessened by the difficulties encountered to date."

J1.58:

FOIA Counselor (FTS) 724-7400

Can the "Glomarization" defense be used to protect the privacy of persons mentioned in records other than those compiled for law enforcement purposes?

Yes. The special "Glomarization" defense under the FOIA—by which an agency refuses to confirm or deny the existence of any record responsive to a request—is theoretically applicable whenever a FOIA request is formulated in such a way that any other response to it, even the withholding of any existing records in their entireties, would cause one of the harms covered by a FOIA exemption. The "Glomarization" principle was developed and first applied in the particularly sensitive national security area, but it already has been accepted by the courts in the privacy area as well. In the last issue of *FOIA Update*, the use of "Glomarization" to protect privacy interests in law enforcement records was examined in detail. *See FOIA Update*, Winter 1986, at 3-4. Such protection, available through Exemption 7(C), is based upon the fact that even the acknowledgment of the existence of a law enforcement file maintained on a named individual would invade that person's privacy. *See, e.g., Antonelli v. FBI*, 721 F.2d 615, 617-19 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

In this same vein, a "Glomarization" defense could properly be raised for particularly sensitive non-law enforcement records, based upon Exemption 6, whenever a request is phrased in such a way that the mere acknowledgment of the existence or non-existence of records responsive to it would cause "a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). For example, an agency which maintains an alcohol abuse treatment program for its employees, with program records kept under each participating employee's name, surely would regard any outright list of program participants as entirely withholdable under Exemption 6, for the reason that the mere identification of a participant in such a program would be quite harmful. *See, e.g., Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974) (Exemption 6 protects such personal matters as medical condition and other characteristics likely to cause embarrassment). Yet in order to provide protection consistent with that, an agency must be prepared to resist any third-party request for such records regarding a particular named individual, lest the very same identities be disclosed indirectly. In such a situation, an agency must treat the request as if it were for a record which itself indicated whether the subject individual's name is on an existing list, and accordingly it should "Glomarize" in response to the request. *Accord Phillippi v. Central Intelligence Agency*, 546 F 2d 1009, 1012 (D.C. Cir. 1976).

To date, no court has had occasion to consider the "Glomarization" defense in the Exemption 6 context, but it is highly likely that such a case will someday arise. *Cf. United States Department of State v. Washington Post Co.*, 456 U.S. 595, 596-97 (1982) (discussing Exemption 6's applicability to "Glomarization"-like situation). As was recognized in one of the first "Glomarization" cases years ago, the uses that can be made of FOIA requests "are limited only by the ingenuity brought to bear to fashion them." *Gardels v. Central Intelligence Agency*, 510 F. Supp. 977, 980 (D.D.C. 1981), *aff'd*, 689 F.2d 1100 (D.C. Cir. 1982). Because of the novelty and delicacy of this defense, though, all federal agencies are urged to consider its application only in careful consultation with the Office of Information and Privacy. *See FOIA Update*, Spring 1983, at 5.

When a requester fails to pay properly assessed search and/or duplication fees, despite his previous commitment to pay such an amount, may the agency refuse to process subsequent requests until that outstanding balance is paid?

Yes. An agency is not required to process a request for records until all fees previously incurred by that requester have been paid. *See Crooker v. United States Secret Service*, 577 F. Supp. 1218, 1219-20 (D.D.C. 1983) (dismissal based upon failure to "exhaust all administrative remedies" because requester was in default for fees assessed on prior request to same agency); *Mahler v. United States Bureau of Prisons*, 2 GDS ¶82,031 at 82,258 (D.D.C. 1980) (same). This logically holds true also where the requester has failed to pay FOIA fees assessed by another government agency. *See Mason v. Bell*, Civil No. 78-719-A, slip op. at 1 (E.D. Va. May 16, 1979). Moreover, where a requester has breached a previous commitment to pay fees, the agency may reasonably require advance payment of the full amount of the fees estimated to be involved in the second request, in addition to all fees previously owed. *See, e.g.*, 28 C.F.R. §16.10(f)(2) (1986) (Department of Justice fee regulation).

Does a draft document have to differ from the final document to be protectible under Exemption 5?

No. Deliberative process privilege protection under Exemption 5 is available to a draft document regardless of whether it differs from its final version. As one court has phrased it, there "is no merit to [the] argument that in order to establish the privileged character of a draft, [an agency] must show to what extent the draft *differs* from the final document. The effect of this would be to expose what occurred in the deliberative process between the draft's creation and the final document's issuance." *Exxon Corp. v. Department of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (emphasis in original). *See also, e.g., Russell v. Department of the Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982) ("a simple comparison between the pages sought and the official document would reveal . . . an agency decision-maker's judgment"); *Lead Industries Ass'n v. Occupational Safety & Health Administration*, 610 F.2d 70, 86 (2d Cir. 1979) ("If a segment appeared in the final version, it is already on the public record [or exempt for other reasons] and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process . . . ."). *But see Texaco, Inc. v. Department of Energy*, 2 GDS ¶81,296 at 81,833 (D.D.C. 1981) (ruling, without analysis, to the contrary). Of course, it should not be forgotten that an exception to this general rule of draft document protection comes into play whenever an agency cites a draft document as binding precedent or otherwise adopts it as working agency law. *See, e.g., Taxation With Representation Fund v. IRS*, 646 F.2d 666, 682 (D.C. Cir. 1981); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 860 (D.C. Cir. 1980). *See also FOIA Update*, Jan. 1983, at 6.

U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

FOIA Legal and Administrative Contacts at Federal Agencies

The Office of Information and Privacy (OIP) is the principal contact point within the Executive Branch for advice and policy guidance on matters pertaining to the administration of the Freedom of Information Act. Through OIP's FOIA Counselor Service, experienced FOIA attorneys are available to respond to FOIA-related inquiries at (FTS) 724-7490.

For inter-agency contact purposes, the following list contains the principal FOIA legal and administrative contacts at all federal agencies dealing regularly with FOIA matters. In some instances (*e.g.*, Department of Defense), all major agency components are listed individually under the agency. In other instances (*e.g.*, Food and Drug Administration), major agency components are listed separately. In still other instances (*e.g.*, Department of Labor), no components are listed, as it is the agency's preference that all FOIA contacts be made through its main FOIA office.

All telephone numbers are FTS numbers unless a local area code is listed. When both the legal and administrative contacts (marked "L" and "A" respectively) are at the same address, the common address follows the name of the administrative contact. OIP should be notified whenever there is a change in a legal or administrative contact or any change in address, telephone number or title.

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***Freeman v. United States Department of Justice*, Civil No. 85-0958-A (E.D. Va. Mar. 12, 1986).**

In a case which further recognizes the validity of an investigative agency's refusal to either confirm or deny the existence of responsive information under appropriate circumstances, the U.S. District Court for the Eastern District of Virginia has ruled that the FBI properly used such a "Glomarization" response when confronted with a request for "[a]ll documents contained in the informant file of Teamsters president Jackie Presser." Relying on Exemption 7(C)'s personal privacy protections, the Court found that absent Mr. Presser's consent his "interest in non-disclosure of personal privacy information outweighs the public interest in scrutinizing the integrity of the FBI." It further recognized that the public interest in effective law enforcement would be ill-served by undermining the system of confidentiality which safeguards FBI sources from embarrassment, harassment or retaliatory measures. The Court also rebuffed the plaintiff's contention that Exemption 7(C) protection had been rendered inapplicable by the publication of newspaper stories based on anonymous sources which purportedly identified Jackie Presser as an FBI informant. "[M]edia speculation," the Court reasoned, was insufficient to justify the release of any confidential informant information where the FBI had made no "official public disclosure concerning Mr. Presser's alleged relationship with it."

***Crooker v. BATF*, 789 F.2d 64 (D.C. Cir. 1986).**

In a sharp reminder of the need for "requisite specificity" in affidavits supporting Exemption 7(A) claims, the U.S. Court of Appeals for the D.C. Circuit reversed a lower court ruling that had allowed a "blanket" justification for the withholding of records from incarcerated felon and frequent FOIA litigator Michael Crooker, who is currently under investigation "concerning suspected possession of an unregistered machinegun." Pointing to the legislative history of Exemption 7(A), the D.C. Circuit distinguished between "blanket exemptions," which are impermissibly based solely on the status of the file in which records are contained, and "generic determinations" of likely investigatory interference, which are properly based on categories of documents. *Accord FOIA Update*, Spring 1984, at 3-4. Although ruling that the BATF's "blanket" assertion that the "file at issue involves a legitimate law enforcement investigation" was too general to support its exemption claim, in this case the Court of Appeals reaffirmed that the government need not justify the application of Exemption 7(A) "document-by-document; it may instead do so category-of-document by category-of-document." It concluded by noting that affidavits relying on "generic" determinations must include categories of documents that are "sufficiently distinct" to permit a reviewing court "to trace a rational link between the nature of the document and the alleged likely interference."

***M/A-COM Information Systems, Inc. v. HHS*, Civil No. 85-3215 (D.D.C. Mar. 4, 1986).**

In a case of first impression, U.S. District Court Judge Gerhard A. Gesell has ruled that documents prepared in settlement negotiations between the United States and an opposing party can be protected under Exemption 4. The records at issue were developed by and exchanged between counsel for the Department of Health and Human Services and counsel for Paradyne Corporation, a government contractor, in an effort to settle a debarment action brought against Paradyne. The requester, a commercial competitor of Paradyne's, argued that the records were entitled to no privilege protection. Judge Gesell, however, disagreed, declaring that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required." He rejected, though, the Government's alternative argument that the records were protectible also under Exemption 5, stating simply that documents exchanged between an agency and an outside party are not "inter" or "intra" agency documents.

***AT&T Information Systems, Inc. v. GSA*, 627 F. Supp. 1396 (D.D.C. 1986).**

In a "reverse" FOIA suit brought by AT&T to prevent GSA from releasing information relating to its successful bid on a federal telecommunications contract, U.S. District Court Judge Louis F. Oberdorfer found that GSA had not acted "arbitrarily and capriciously in determining that release of the contested documents posed no substantial likelihood of competitive injury" to AT&T. Although the scope of judicial review in such cases is ordinarily limited to the administrative record, Judge Oberdorfer in this case considered a GSA declaration because it was "corroborated" by the letters sent to the requester and AT&T during the original decision-making process and therefore was not "a *post hoc* rationalization." He found GSA's decision to release the contested information, including AT&T's unit prices, to be reasonable in light of the fact that future telecommunications contracts would have different requirements and conditions making it difficult for competitors "to use the released information against [AT&T] in future bids." Moreover, Judge Oberdorfer found "a strong public interest in release of component and aggregate prices in Government contract awards." AT&T has filed a notice of appeal.

***Grasso v. IRS*, 785 F.2d 70 (3d Cir. 1986).**

In a forceful articulation of the legal difference under the FOIA between third-party witness statements and first-party interviews, the U.S. Court of Appeals for the Third Circuit has affirmed a lower court ruling requiring disclosure of an IRS memorandum of an investigatory target's own statement. Pointing out that "[t]he typical Exemption 7(A) situation arises when the documents sought are . . . otherwise 'not in the possession of known or potential defendants,' " the Third Circuit reasoned that the dangers sought to be prevented by Exemption 7(A) are "patently inapplicable" in a case where the requester seeks his own statement. (Interestingly, it reached this result even though it considered only the IRS's argument, as the requester chose not to participate in the appeal.) Although none of the usual rationales for withholding information under Exemption 7(A)—such as fear of witness intimidation—was present in this case, the Court of Appeals did leave open the possibility that Exemption 7(A) could conceivably protect a target's statement if it could reveal the direction of a potential investigation.

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Office of Information and Privacy: Annual Update Seminar on the FOIA, 8:30 a.m. to 1 p.m., **September 30**, U.S. Department of Labor Headquarters Building, Washington, D.C. Contact: Karen M. Finnegan, (FTS) 724-7402. No charge.

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Boston Region Training Center: Implementation of the Privacy and Freedom of Information Acts, **July 21-22**, U.S. Customs House, Boston, MA. Contact: Daniel J. Buckley, (FTS) 223-5786. Cost: $225.

New York Region Training Center: Successful Implementation of the Freedom of Information and Privacy Acts, **September 9-10**, 26 Federal Plaza, New York, NY. Contact: Daniel Parker, (FTS) 264-8431. Cost: $200.

New York Region Training Center: Freedom of Information and Privacy Acts Workshop for Administrative and Secretarial Personnel, **September 11-12**, 26 Federal Plaza, New York, NY. Contact: Daniel Parker, (FTS) 264-8431. Cost: $200.

Denver Region Training Center: Freedom of Information and Personal Privacy, **August 26-27**, Salt Lake City, UT; **August 28-29**, Denver, CO. Contact: Nina Schmidt, (FTS) 776-4088. Cost: $150.

Center for Communications and Administrative Management Training Institute: Successful Implementation of the Freedom of Information Act and the Privacy Act, **August 20-21**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-5600. Cost: $225.

Center for Communications and Administrative Management, Administrative Management Training Institute: FOIA and Privacy Act Workshop for Administrative and Secretarial Personnel, **September 18-19**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-5600. Cost: $225.

Government Affairs Institute: Eighth Annual Symposium on the Freedom of Information Act and the Privacy Act, **August 12-13**, Washington, D.C. Contact: Karis Obrenski or Barry Brown, (FTS) 632-5662. Cost: $275.

1986 *Case List*

The Office of information and Privacy will publish the 1986 edition of the *Freedom of Information Case List* in September. Agencies wishing to order multiple copies of the *Case List* should do so by forwarding a requisition (specifying publication number 6-00578) to the Government Printing Office by no later than August 15. The base price for the 1986 edition is expected to be only approximately $1.50 when ordered in advance through agency printing officers.

As in the past, the Office of Information and Privacy will send one courtesy copy of the *Case List* to each principal FOIA contact at each agency. Additional copies must either be ordered in advance or purchased at full price from the GPO bookstore. The bookstore price last year was $9.00.

The 1986 edition of the *Case List* will again contain a comprehensive index of both published and unpublished FOIA and Privacy Act decisions, as well as an updated "Justice Department Guide to the Freedom of Information Act," and the texts of the FOIA, the Privacy Act and the other major federal access statutes.

Pamela Maida, editor of the *Case List*, is available to answer inquiries at (FTS) 724-7402.

FOIA UPDATE

Published quarterly by the Office of Information and Privacy, Office of Legal Policy, U.S. Department of Justice, Washington, D.C. 20530, (FTS) 724-7400.

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Distributed without charge by OIP to all FOIA offices and other interested offices governmentwide. Also available through the Superintendent of Documents, GPO, Washington, D.C. 20402. Stock No. 027-000-80002-5. Nongovernment subscription price: $10.00, domestic; $12.50, foreign.

U.S. Department of Justice
Office of Legal Policy/Office of Information and Privacy

Vol. VII, No. 3
Summer 1986

DEC 3 1 1986
U. S. GOVT. PUBS
DEPOSITORY 378
DEC 3 1 1986

FOIA UPDATE

FOIA Training Still Widely Available

Despite governmentwide budgetary constraints and sharp cutbacks in some areas of federal employee training, Freedom of Information Act training opportunities have remained widely available during this past year, and this can be expected to continue as the demand for FOIA training continues to remain high.

Traditionally, most formal FOIA training has been provided on a governmentwide basis because of the cross-cutting nature of FOIA issues and the need for uniformity among agencies in their administration of the Act. The Office of Personnel Management and, more recently, the Department of Justice have taken the lead in this area by sponsoring and conducting many FOIA training programs available to all federal employees over the years.

Update on Training

The tightening of federal agency budgets for such "discretionary" items as training, though, has necessitated certain program reviews and adjustments to ensure the continued availability of a full range of FOIA instruction.

DEPARTMENT OF JUSTICE

At the Department of Justice, extreme budgetary constraints earlier this year threatened a substantial cutback in the government's major FOIA training program.

For the past several years, the bulk of governmentwide FOIA training was conducted under the auspices of the Legal Education Institute, part of the Justice Department's Office of Legal Education, located organizationally within the Department's Executive Office for U.S. Attorneys. However, when that entire organization suddenly faced severe budgetary shortages in early 1986, LEI was unable to maintain its role in FOIA training.

OIP Training Officer Philip Kesaris instructs at a recent FOIA seminar.

Consequently, the Office of Information and Privacy, which had been conducting FOIA training under LEI's auspices for several years, assumed LEI's organizational role and began providing FOIA training directly, using its own resources, at less overall cost. As in the past, there is no charge for attendance at OIP-conducted training.

The first such OIP training session was the Advanced FOIA Seminar, a program limited to 40-45 senior FOIA personnel, which was held on June 4. It was followed by OIP's Introduction to the FOIA for Non-Specialists in early September, which was attended by a record number of participants for such a session. These programs, each of which will be offered twice yearly by OIP, are designed to complement the more extensive, two-day basic FOIA training course.

That two-day FOIA course, entitled "The Freedom of Information Act for Attorneys and Access Professionals," has been a staple of governmentwide FOIA training for many years. A combination of lecture presentations and student-selected workshops, it provides detailed basic instruction in FOIA policies and practices to hundreds of agency access professionals annually.

OIP will continue to conduct this course no less than five times per year, with organizational assistance from the Department's Office of Legal Education. It is so heavily in demand that nearly 250 applicants sought to be among its 85 attendees at its most recent offering in July.

Cont'd on next page

Inside Update

New Supplemental Fee Waiver Guidance ..... *p. 3*
FOIA Counselor: Protecting Federal Personnel Lists .... *pp. 3-4*
FOIA Counselor Q&A: Trade Secrets Act Not An Exemption 3 Statute ..... *p. 6*

. . . Opportunities for FOIA Training Remain

Cont'd from p. 1

NEW "UPDATE" SEMINAR

It was to meet this consistently high demand for FOIA training that OIP broadened the range of course offerings with its introductory and advanced training sessions. Toward this same end, OIP inaugurates another new seminar this year, one designed for the access professional or agency official who needs only a periodic update on current FOIA case law and policy developments.

Entitled the "Annual Update Seminar on the FOIA," this new training session will be conducted by OIP at the end of September each year, immediately upon completion of work on OIP's annual "Justice Department Guide to the FOIA," which is published as part of its *Freedom of Information Case List*. A special prepublication copy of the "Justice Department Guide" is provided to all participants.

Also of significance is the fact that this new seminar is offered without the usual space limitations, because it is being held by special arrangement in the main auditorium of the FBI Headquarters Building. More than 250 persons registered to attend its inaugural session.

NATIONWIDE TRAINING

The one aspect of FOIA training inescapably limited by budgetary constraints is the availability of training opportunities outside of the Washington, D.C. area. The two-day basic FOIA course, which in recent years has been offered twice annually in different parts of the country, has been restricted to D.C. during 1986.

OIP has worked to fill the gap, though, by holding special training sessions in targeted areas where the need is greatest. During the past year, it has provided such training at special agency request in eight different locations throughout the country, including two military bases. In two instances, this training was made available through novel cooperative arrangements made with local bar associations.

The primary source of FOIA training outside of Washington, however, remains the Office of Personnel Management, which regularly provides basic FOIA and Privacy Act training sessions in each of the federal regions. In many areas of the country, this is the only formal access law training available to federal employees.

While OPM's regional training activities have been affected somewhat by budget constraints this past year, it continues to provide a valuable selection of FOIA training, albeit at some cost to the participating agencies. (See "Training Opportunities" on page 8 of this issue.)

ADDITIONAL TRAINING

Additional FOIA training is available as well in the Washington, D.C. area. The Office of Personnel Management, for example, provides basic instruction in FOIA administrative procedures that is designed primarily for administrative and secretarial personnel.

Through its Center for Communications and Administrative Management, OPM continues to offer such sessions on FOIA and Privacy Act implementation several times per year, under the overall direction of Indiana State University Professor William H. Harader.

Once a year, in August, Professor Harader also coordinates the presentation of the OPM Government Affairs Institute's Annual Symposium on the Freedom of Information and Privacy Acts, a two-day program held on Capitol Hill for senior agency officials. This year's program was the eighth such symposium and it featured an address by Assistant Attorney General for Legal Policy Stephen J. Markman.

Another federal source of FOIA training is the Graduate School of the U.S. Department of Agriculture. In the past, it offered as many as eight courses annually on federal access laws, which it presented with curricular and instructional support from OIP, but it has always charged a substantial tuition for such programs. Recently, as enrollment in these courses has been diminishing, the Graduate School has reduced the frequency of its offerings.

Finally, there is the continued availability of specialized training at individual agency request through OIP. OIP's training officer, Philip A. Kesaris, with the assistance of paralegal specialist Karen M. Finnegan, reviews FOIA training activities and works to ensure the meeting of both individual and multi-agency FOIA training needs.

During this past year, for instance, OIP discerned the need for greater coordination and uniformity among federal agencies possessing law enforcement records in their administration of certain aspects of the Act. Consequently, OIP is planning to conduct a training session designed to meet this need, entitled the "Special FOIA Seminar for Law Enforcement Agencies." Scheduled to be held on February 4, 1987, this session will be open to all federal agencies that deal with law enforcement records.

1986 *Case List*

The September 1986 edition of the *Freedom of Information Case List* is now available through the Superintendent of Documents, GPO, Washington, D.C. 20402. (Stock Number 027-000-01262-1) The price is $9.00 per copy.

Edited by Pamela Maida of the Office of Information and Privacy staff, the 1986 edition of the *Case List* contains more than 2500 FOIA and Privacy Act access cases, with full case histories.

In addition, there are separate updated listings of cases interpreting all aspects of the Privacy Act of 1974, the Government in the Sunshine Act, and the Federal Advisory Committee Act, as well as a list of all "reverse" FOIA cases to date.

The 462-page reference volume also contains an expanded "Justice Department Guide to the Freedom of Information Act" and citations to related law review articles.

FOIA UPDATE

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Supplemental Fee Waiver Guidance

[Below is the full text of the supplemental fee waiver guidance memorandum recently issued to the heads of all federal departments and agencies by Stephen J. Markman, Assistant Attorney General, Office of Legal Policy]

In January 1983, Jonathan C. Rose, former Assistant Attorney General for the Office of Legal Policy, issued general guidance to all federal agencies on the waiving of fees otherwise assessable under the Freedom of Information Act (FOIA), 5 U.S.C. §552. That guidance outlined the criteria which should logically govern the determination of requests for the waiver or reduction of FOIA fees, in accordance with the statutory requirement that such requests be granted "where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. §552(a)(4)(A).

That guidance, however, did not address the possible filing of large-scale FOIA requests by libraries or other record repository institutions which seek fee waivers simply on the basis of their status as such institutions. Recently, many agencies have become concerned about such fee waiver requests and have sought specific guidance from the Department of Justice on their proper resolution.*

Therefore, on behalf of the Attorney General, *see* 28 C.F.R. §0.23(c) (1985), and in accordance with 5 U.S.C. §552(d), I hereby provide the following additional guidance which is intended to assist agencies in the determination of fee waiver requests made by such institutions:

> An agency is not required to grant a fee waiver to a library or other record repository (or to a requester who intends to disseminate information to such an institution) based solely upon its status as an institution at which records are generally available. Rather, fee waiver requests from such institutions, like those of any other requester, should be considered on a case-by-case basis in light of all relevant information. In particular, where a fee waiver request from an institution or individual is based upon intended dissemination to other such institutions, or upon scholarly or other analytic work to be done by another person to whom the requested records (or any information based thereon) ultimately will be made available, an agency may reasonably require the requester to identify specifically a person who will actually use such information in scholarly or other analytic work and to make the same showing that that person would have to make to obtain a fee waiver for the records directly, including a representation by that person of intent to perform the work involved.

I urge all federal agencies to apply this guidance—in addition to the fee waiver guidance previously issued by the Department, see *FOIA Update*, Jan. 1983, at 3-4; see also *FOIA Update*, Fall 1983, at 14—to any fee waiver request received from a library or other record repository institution. Through the careful application of these principles, agencies can fulfill the statutory mandate of "ensur[ing] that the public would benefit from the expenditure of public funds for the disclosure of public records." *Ely v. United States Postal Service*, 753 F.2d 163, 165 (D.C. Cir.), *cert. denied*, 105 S. Ct. 2338 (1985).

*Although Congress has recently enacted certain revisions to the fee provisions of the FOIA, as part of the Anti-Drug Abuse Act of 1986, Public Law No. 99-570, those revisions will not take effect until April 25, 1987. This memorandum is intended to provide interim guidance to agencies for the determination of fee waiver requests under current law.

FOIA Counselor

Protecting Federal Personnel Lists

With increasing frequency, federal agencies are faced with Freedom of Information Act requests which seek access to lists of agency employees and their office or duty station addresses. Such records are often sought for "mailing list" purposes by requesters interested in soliciting federal employees.

For many agencies—particularly those which employ law enforcement or military personnel or those whose records are not easily produced in response to such requests—these FOIA requests pose significant privacy concerns and/or administrative burdens. For such requests, the protection afforded by Exemption 6, 5 U.S.C. §552(b)(6), as well as the much broader authority to withhold such compilations under Exemption 2, 5 U.S.C. §552(b)(2), should be carefully considered.

Employee Privacy Interests

Exemption 6 of the FOIA, which protects records the release of which would constitute "a clearly unwarranted invasion of personal privacy," 5 U.S.C. §552(b)(6), is generally inapplicable to agency personnel lists inasmuch as there is no viable privacy interest in the names and business addresses of most federal employees. *See FOIA Update*, Sept. 1982, at 3. Indeed, the Office of Personnel Management has promulgated a regulation which requires that the names of most individual employees and their official duty addresses (as well as other specified data) be made available to the public, 5 C.F.R. §293.311(a) (1986), except where "the data sought is a list" of such names and work addresses that would "otherwise be protected from mandatory disclosure under an exemption of the FOIA," 5 C.F.R. §293.311(b) (1986). (This exception is particularly significant with respect to the application of Exemption 2, discussed *infra*.)

The few FOIA decisions to have focused on requests for basic employee lists containing office addresses or duty stations have found no protectible privacy interests in such records. *See, e.g., Hopkins v. Department of the Navy*, Civil No. 84-1868, slip op. at 4 (D.D.C. Feb. 5, 1985) (release of names and official duty addresses of marines stationed at Quantico, Virginia would not constitute invasions of personal privacy because it "would disclose nothing about any of the individuals listed other than the fact that they are members of the armed services, which is itself a matter of public record"); *National Western Life*

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Insurance Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) ("It cannot be seriously contended that postal employees have an expectation of privacy with respect to their names and duty stations."). These decisions, of course, should not be confused with those properly affording privacy protection for federal employees' *home* addresses. *See, e.g., American Federation of Government Employees v. United States*, 712 F.2d 931, 932-33 (4th Cir. 1983); *accord FOIA Update*, Sept. 1982, at 3.

Certain categories of federal employees, however, certainly do possess privacy interests in their identities and work locations sufficient to warrant Exemption 6 protection. For instance, due to the nature of their work, law enforcement personnel often face personal harassment and even physical danger as a result of their employment. For such employees, the courts have routinely found a privacy interest sufficient to permit the withholding of their identities. *See, e.g., New England Apple Council, Inc. v. Donovan*, 725 F.2d 139, 142-44 (1st Cir. 1984) (protecting Inspector General investigator under Exemption 7(C)); *Lesar v. United States Department of Justice*, 636 F.2d 472, 487-88 (D.C. Cir. 1980) (protecting FBI Special Agents under Exemption 7(C)); *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978) (same).

Similarly, the names and duty station addresses of military personnel "serving overseas or with classified, sensitive or deployable units" have been held to be withholdable on personal privacy grounds. *Falzone v. Department of the Navy*, Civil No. 85-3862 (D.D.C. Oct. 16, 1986) (protecting "potential targets of threats and terrorist attacks" under Exemption 6); *see also* Defense Privacy Board Advisory Opinion 14 (Mar. 13, 1986) (establishing refined policy of withholding names and duty addresses of military personnel serving in units stationed overseas or in units readily deployable). Thus, such "mailing list" records regarding these particular groups of employees can qualify for withholding under Exemption 6.

Alleviating Administrative Burden

Additionally, Exemption 2 of the FOIA—which permits the withholding of records "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. §552(b)(2)—can provide broad protection for address lists of federal employees regardless of the sensitivity of their positions. This exemption is now understood to encompass two distinct categories of agency records which are internal in nature—those the disclosure of which would risk circumvention of law, under the D.C. Circuit Court of Appeals' decision in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (en banc), and those involving "trivial administrative matters of no genuine public interest," under the D.C. Circuit's decision in *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983). It is this latter aspect of Exemption 2—uniquely designed to shield agencies from the sheer burden of FOIA processing, *see FOIA Update*, Winter 1984, at 10—which warrants consideration for its possible application to requests for employee address lists.

The first step in this Exemption 2 analysis is to verify that the list sought is an "administrative" record created primarily for internal, housekeeping purposes. *See Founding Church of Scientology v. Smith*, 721 F.2d at 830 n.4 (the record must fall "within the terms of the statutory language as [pertaining to] a personnel rule or internal practice of the agency"). Surely almost any compilation of agency employee names would qualify as such under any reasonable interpretation of matters relating to "internal practices of the agency." Indeed, the courts have regarded this phrase as broadly encompassing a wide range of administrative records. *See, e.g., Martinez v. FBI*, Civil No. 82-1547, slip op. at 10-11 (D.D.C. Dec. 19, 1985) (caseload management and timekeeping records); *Badhwar v. United States Department of the Air Force*, 615 F. Supp. 698, 706 (D.D.C. 1985) ("For Official Use Only" stamps); *Ferri v. United States Department of Justice*, 573 F. Supp. 852, 863 (W.D. Pa. 1983) (file jackets); *see also National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 527 n.4 (D.C. Cir. 1986) (and cases cited therein).

Under the second step of this analysis, agencies should consider whether there is a legitimate public interest in the information. As the D.C. Circuit phrased it in *Founding Church of Scientology*, "if the material relates to trivial administrative matters of no genuine public interest, exemption [will] be automatic under the statute." 721 F.2d at 830 n.4. *See also Department of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1976) (Exemption 2 protects "matters in which the public could not reasonably be expected to have an interest."); *Martin v. Lauer*, 686 F.2d 24, 34 (D.C. Cir. 1982) (Exemption 2 is "designed to screen out illegitimate public inquiries into the functioning of an agency.").

Because employee address lists neither regulate public behavior nor shed any light on how an agency operates, it is quite difficult to imagine any circumstance in which the *public* could have any legitimate interest in their disclosure, especially given the nature and purpose of the typical "mailing list" requester. Rather than serving any public interest, their FOIA-compelled disclosure easily could—depending on the circumstances of the request and the agency's recordkeeping procedures—impose a substantial administrative burden on the agency, simply because of the effort necessary to comply with the FOIA request. *See Martin v. Lauer*, 686 F.2d at 34 (Exemption 2 "serves to relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest."). Thus, Exemption 2's unique "burden" protection can justifiably be invoked—at the discretion of individual agencies—for such requests.

If, however, a requester is able to identify a legitimate public interest in disclosure of a requested address list, then this special protection under Exemption 2 is inapplicable. *Cf. FBI Agents Ass'n v. FBI*, 3 GDS ¶83,058, at 83,566-67 (D.D.C. 1983) (administrative manual sections dealing with code of conduct, discipline and grievance procedures and equal opportunity programs ordered disclosed as "matters of public concern and interest"). Although such a showing would be quite unusual in an employee address list case, it cannot be forgotten that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests." *Founding Church of Scientology v. Smith*, 721 F.2d at 830-31 n.4.

Conclusion

In sum, Exemption 6 provides a narrow but important basis for protecting lists of the names and official duty addresses of federal employees whose positions place them at a risk of personal danger or harassment. Additionally, Exemption 2 provides all agencies with broad, discretionary authority to avoid the administrative burdens involved in the processing of FOIA requests for such records when neither the agency nor the requester identifies any legitimate public interest in disclosure. All agencies therefore should consider the possibility of nondisclosure under either or both of these exemptions when facing such FOIA requests.

***Durns v. Bureau of Prisons*, No. 85-5704 (D.C. Cir. Sept. 12, 1986), *amended upon filing of dissenting opinion* (D.C. Cir. Oct. 10, 1986).**

In potentially the most important Exemption 5 decision of the year, the U.S. Court of Appeals for the D.C. Circuit has ruled that agency copies of presentence reports prepared by and for employees of the judicial branch of government satisfy Exemption 5's "inter-agency or intra-agency memorandums" threshold and, because they are not "routinely available" in civil discovery, can be withheld under that exemption. Circuit Judge Laurence H. Silberman, joined by former Circuit Judge Antonin Scalia, first declared that Exemption 5's threshold language should be given a sufficiently "functional" reading to encompass such reports. Then, finding an "impressive body of doctrine" in discovery case law recognizing the "normally" privileged nature of presentence reports, albeit in a third-party context, he concluded that the Supreme Court's rationale in *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984), compelled their nondisclosure under the FOIA. Lastly, he dismissed the argument that FOIA exemptions had been waived when the requester was permitted to view (but not retain) a copy of his report during the parole process, on the basis that such a fact simply "does not establish that presentence reports are routinely available" in civil discovery. A petition for rehearing *en banc*, based largely on Circuit Judge J. Skelly Wright's dissent, is pending.

***Washington Post Co. v. HHS*, 795 F.2d 205 (D.C. Cir. 1986)—*reversing* 603 F. Supp. 235 (D.D.C. 1985).**

In a surprising and controversial decision, a divided panel of the U.S. Court of Appeals for the D.C. Circuit rejected as untimely HHS's use of an Exemption 4 "privilege" defense that was raised for the first time on remand from the court's previous order, disavowing the court's prior suggestion to the government that it raise such a new defense. In the prior appeal, the D.C. Circuit had found that the requested reports of financial interests held by HHS consultants met Exemption 4's threshold, but it remanded the case for reconsideration of the applicability of the "confidentiality" portion of that exemption. Writing for the court, Circuit Judge Patricia M. Wald had stated that "in case the issue is raised on remand" the applicability of the confidential report privilege should be considered.

On remand, HHS readily asserted the confidential report privilege under Exemption 4 and the district court, citing the Supreme Court's intervening decision in *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), indeed held the records protectible on that basis. See *FOIA Update*, Winter 1985, at 5. Back on appeal, however, a majority opinion written by then-Circuit Judge Antonin Scalia and joined by Judge Wald ironically dismissed as "dictum" the court's earlier invitation and held that HHS had "waived" its right to raise this new aspect of Exemption 4 by not doing so at the outset of the case.

***Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986).**

In a long-awaited decision addressing the circumstances under which a statute can supersede, or "displace," the FOIA as the primary mechanism for agency record disclosure, the U.S. Court of Appeals for the D.C. Circuit has held that Section 6103 of the Internal Revenue Code, 26 U.S.C. §6103 (1982)—which specifies lengthy exceptions to its general rule of nondisclosure for tax return information—does not "displace" the FOIA despite the "painstaking detail" of its exceptions. The D.C. Circuit held that "that sort of comprehensiveness has nothing to do with the appropriateness of continuing application of the FOIA." Rather, it declared, the implicit "displacement" of the FOIA may be found only where a statute has "established some rules and procedures—duplicating those of FOIA—for individual members of the public to obtain access to documents [generated under that statute]." (By contrast, the disclosure provisions of Section 6103 pertain mostly to specific private individuals or government officials, not to the public at large.) The consequence of this decision is that, as a mere Exemption 3 statute, Section 6103 will be subject to all of the procedural requirements of the FOIA, including *de novo* judicial review.

***Tax Analysts v. United States Department of Justice*, 643 F. Supp. 740 (D.D.C. 1986).**

In a case of first impression, U.S. District Court Judge Stanley S. Harris relied upon *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 385 (1980), to hold that agency copies of records concededly available through the clerks' offices of the federal district courts were not "improperly withheld" under the FOIA by the Department of Justice's Tax Division. The requester, a tax law publication service, had periodically sought the Tax Division's copies of recent district court tax case opinions. While recognizing that the requester might encounter some obstacles in obtaining these slip opinions directly from their respective courts, Judge Harris pointedly noted that they are in fact "publicly available for inspection and copying [through each clerk's office] almost immediately upon issuance." He concluded that the availability of the opinions negated any "danger of secret agency law" and that FOIA-ordered disclosure would not further the congressional purpose of enabling the public to obtain records concerning the "decision-making procedures" of federal agencies. The requester has appealed.

***Spannaus v. United States Department of Justice*, 643 F. Supp. 698 (D.D.C. 1986).**

In another case of first impression, U.S. District Court Judge Joyce Hens Green has ruled that the six-year general statute of limitations governing all suits against the United States applies to bar a FOIA suit filed more than six years after its underlying administrative process was "constructively" exhausted. Dismissing as untimely a FOIA lawsuit seeking FBI records pertaining to Lyndon H. LaRouche, Judge Green noted that a "right of action first accrues" under 28 U.S.C. §2401(a) when the "right to resort to federal court is first perfected," and that the statute of limitations thus commenced to run in this case in October 1977 when the FBI failed to comply with plaintiff's FOIA request within ten working days. *Accord* 5 U.S.C. §552(a)(6)(C). She flatly rejected the plaintiff's argument that the statute should start to run only when all administrative appeals have been completed (almost two years later, in this case), observing that by permitting FOIA lawsuits to be filed before the administrative process has concluded, "Congress opened the door to the court house earlier" and that it is hardly unfair that "the door closes sooner" as well.

Does the Trade Secrets Act, 18 U.S.C. §1905, qualify as a nondisclosure statute under Exemption 3 of the FOIA?

No. Although at first glance the Trade Secrets Act—which prohibits government employees from disclosing business-related information "to any extent not authorized by law"—might appear to qualify as an Exemption 3 statute under the FOIA, there are compelling reasons why it does not. First and foremost, the Trade Secrets Act's broad and ill-defined wording fails to meet the standards of either subpart of Exemption 3. Its prohibition against disclosure is not absolute, thereby failing to satisfy the requirement of subpart (A). And because its general prohibition against disclosure—which by its broad terms could reach virtually all agency-held business information—does not with any meaningful specificity define or categorize the information to be withheld, nor does it include any criteria for withholding, §1905 likewise fails to meet either requirement of Exemption 3's subpart (B). *See, e.g., National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 686-87 (D.C. Cir. 1976) (dictum); *Florida Medical Ass'n v. HEW*, 479 F. Supp. 1291, 1302 (M.D. Fla. 1979); *United Technologies Corp. v. Marshall*, 464 F. Supp. 845, 851 (D. Conn. 1979); *Westchester General Hospital v. HEW*, 464 F. Supp. 236, 243 (M.D. Fla. 1979); *see also AT&T Information Systems, Inc. v. GSA*, 627 F. Supp. 1396, 1404-05 (D.D.C. 1986) (appeal pending); *cf. Burnside-Ott Aviation Training Center, Inc. v. United States*, 617 F. Supp. 279, 285 (S.D. Fla. 1985) (regarding §1905 as impractically broad and ill-defined). *But see, e.g., Burroughs Corp. v. Brown*, 501 F. Supp. 375, 382-83 (E.D. Va. 1980), *rev'd on other grounds sub nom. General Motors Corp. v. Marshall*, 654 F.2d 294 (4th Cir. 1981).

Second, the legislative history of the 1976 amendment to Exemption 3 expressly states that §1905 was not intended to qualify as a nondisclosure statute under Exemption 3 as amended and that any FOIA analysis of trade secrets and commercial or financial information should focus instead on the applicability of Exemption 4. *See* H.R. Rep. No. 880, 94th Cong., 2d Sess. 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2183, 2205. *See, e.g., General Electric Co. v. NRC*, 750 F.2d 1394, 1401-02 (7th Cir. 1984) ("If a supposed trade secret is not protected by [Exemption 4], the FOIA requires disclosure, and then the Trade Secrets Act by its own terms does not forbid it [as the disclosure would thus be 'authorized by law'] and exemption 3 does not come into play."); *General Dynamics Corp. v. Marshall*, 607 F.2d 234, 236-37 (8th Cir. 1979). *See also FOIA Update*, Summer 1985, at 3 (scope of §1905 logically is no broader than that of Exemption 4).

Is an agency required to provide a *Vaughn* index at the administrative level?

No. The requirement of *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), that an agency should ordinarily provide an itemized index correlating each withheld document (or portion) with a specific FOIA exemption justification was fashioned only in connection with the adjudication of a defendant agency's motion for summary judgment in litigation. In fact, it has been specifically held that "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation." *Crooker v. Central Intelligence Agency*, Civil No. 83-1426, slip op. at 3 (D.D.C. Sept. 28, 1984). *See also Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (encouraging agencies to provide requesters "with sufficient detail about the nature of the withheld documents and its exemption claims at the administrative level," but holding that where *Vaughn* requirements had been satisfied in district court proceedings, failure to provide a *Vaughn* index at the administrative level was not error); *cf. Safecard Services, Inc. v. Securities & Exchange Comm'n*, Civil No. 84-3073, slip op. at 1 (D.D.C. Apr. 21, 1986) ("No court has held that a requesting party may compel production of a *Vaughn* index before completing its administrative appeal."). Indeed, the statutory language of the FOIA requires only that an agency inform the requester of the reasons for the denial of an initial request, of the name and title of each person responsible for the denial, and of the right to an administrative appeal. *See* 5 U.S.C. §552(a)(6)(A)(i), (6)(C).

Can factual information be protected under the deliberative process privilege of Exemption 5?

Yes. Although as a general rule factual portions of documents ordinarily are not covered by the deliberative process privilege, because their disclosure is viewed by the courts as generally not harmful to government decisionmaking, *see EPA v. Mink*, 410 U.S. 73, 87-88 (1973), it must be remembered that there exist two separate and distinct circumstances under which such material has been held to be privileged and thus protectible under Exemption 5. Facts can be protected either "if the manner of selecting or presenting those facts would reveal the deliberative process, *or* if the facts are 'inextricably intertwined' with the policy-making process." *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (footnotes omitted) (emphasis added). The Supreme Court recognized the "inextricably intertwined" rationale in the case that first delineated the fact/opinion dichotomy under Exemption 5, *EPA v. Mink*, 410 U.S. at 91, where it specifically held that facts need be disclosed only where "severable without compromising the private remainder of the documents." *See, e.g., Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971); *Cities Service Co. v. FTC*, 627 F. Supp. 827, 836 (D.D.C. 1984), *aff'd mem.*, 778 F.2d 889 (D.C. Cir. 1985).

The second circumstance warranting the protection of factual material under Exemption 5 is where its disclosure would "expose" the agency's deliberative process, which is based upon the premise that Exemption 5 is designed "to protect the deliberative process of government and not just deliberative material." *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). Thus, where disclosure of factual material would itself reveal an agency's deliberative process—for example, by revealing which facts were selected by a decisionmaker's aides to assist that person in deciding an issue, as in the leading case of *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68, 71 (D.C. Cir. 1974)—Exemption 5 protection is fully warranted. *See, e.g., Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Williams v. Department of Justice*, 556 F. Supp. 63, 65 (D.D.C. 1982).

FOIA Focus: L. Jeffrey Ross

Since the enactment of the Freedom of Information Act in 1966, federal departments and agencies have created a variety of offices and units to handle the administrative processing and litigative aspects of access requests. From the broad diversity of these agencies an experienced corps of FOIA experts has emerged, consisting of attorneys and access professionals who are highly knowledgeable in the various substantive and procedural aspects of the FOIA and its proper administration. These persons are sometimes called upon to share their expertise by teaching in the various federal government training programs sponsored by the Department of Justice or the Office of Personnel Management, in Washington, D.C., and in other regions of the country.

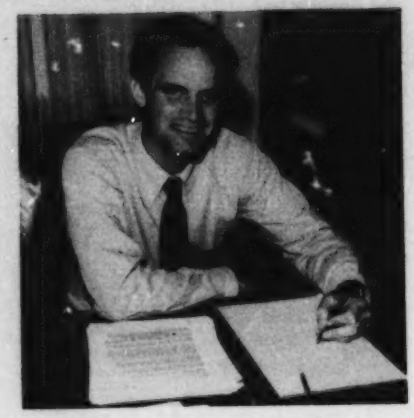
* * * * *

"Whenever new people start work in my office, I send them to the first available FOIA course," says L. Jeffrey Ross, Chief of the FOI/PA Unit of the Justice Department's Criminal Division. "In addition to on-the-job training at their own agency, it's important for new people to have formal, specialized instruction from experts who have worked with particular areas of the FOIA for a number of years."

Ross himself is a veteran FOIA instructor, having taught many "exemption" workshops in training seminars sponsored by the Justice Department, including those conducted in recent years by the Office of Information and Privacy.

"I always start off my FOIA exemption workshops by asking for a show of hands: 'How many people have used this exemption to withhold information?'" continues Ross. "People with little or no experience are my favorite students. They're generally very interested and it's their first impression of how to apply the exemptions." He takes these training responsibilities very seriously, because he knows first-hand how important FOIA training is.

"At this point," Ross says, "one of my major concerns is that people in the field offices are not getting enough FOIA training." He fears that this might be one of the effects of the budget-cutback provisions of the Gramm-Rudman legislation. "This could easily result in a disparity of treatment accorded to documents in field offices as compared to the



treatment in the Washington headquarters," he warns.

Bearing in mind that training seminars can be costly to administer, Ross espouses two cost-cutting suggestions. The Justice Department could send one or two general FOIA experts to major cities to conduct seminars to an audience of employees of several different federal agencies, he suggests; or one major Department—such as the USDA, the Department of Commerce or HUD—could develop an agency-specific FOIA seminar and conduct the course in its regional offices, using one or two instructors from Washington in the program.

Ross is a strong proponent of regular introductory and advanced FOIA training seminars. As head of the Criminal Division's FOI/PA Unit, he supervises three attorneys, thirteen paralegals and four clerks and legal technicians.

Ross is equally enthusiastic about having his experienced attorneys and supervisory paralegals attend OIP's advanced training courses. "Many attorneys working in access law are involved in only the administrative processing of documents," he explains. "They may not always be able to keep abreast of new case law development in FOIA. The advanced courses not only provide a comprehensive overview of new cases, but the instructors also provide the students with an in-depth discussion and with the nuances of each decision."

All of these training seminars have been highly rated by members of Ross's staff. He recalls one new paralegal who attended the introductory seminar and learned quickly. "After she took the course, she would come into my office with changes I'd made in her work. She'd take a stand and argue her position. It was great! The training course not only improved her skills, it made her job more interesting and challenging."

* * * * *

A native of Atlanta, Georgia, Jeff Ross earned his undergraduate degree at Vanderbilt University in Nashville, Tennessee. In 1975, he graduated from the University of Georgia Law School.

In law school, Ross's major interest was international law and while there he had the opportunity of studying under former Secretary of State Dean Rusk. After his second year of law school, he attended the summer program at the Hague Academy of International Law in the Netherlands.

Although Ross came to Washington, D.C. with the intention of eventually working in the field of international law, he instead accepted an attorney position with the U.S. Department of Agriculture, a position he held for eight years.

"It was a terrific job," says Ross. He worked in Agriculture's Research and Operations Division. "It served as a general law office for the entire department. If you had a statute that affected all department components equally, we had responsibility for the legal effects of its administration."

Then, after several years' involvement in contracts, civil rights and personnel law, Ross came to devote half of his time to Federal Tort Claims Act actions and half to FOIA matters.

During his last three years with the Department of Agriculture, Ross served as the legal officer responsible for all FOIA appeals. He was the central point for FOIA litigation for all field offices and for USDA Headquarters. As such, he worked closely with Assistant United States Attorneys on FOIA litigation matters.

In 1983, Ross accepted his Justice Department position as Chief of the Criminal Division's FOI/PA Unit. At Justice, he has found that FOIA administrative work is equally as satisfying.

"The FOIA is there to enable people to find out how their government operates," Ross observes. "Congress also intended that the Act should benefit historians, journalists and scholars who are researching material for books and articles. During the three years of my tenure here I have been pleased that I have been able to assist researchers."

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Third Class

FOIA Training Opportunities

DEPARTMENT OF JUSTICE

Office of Information and Privacy: Advanced Seminar on the Freedom of Information Act, **December 3**, U.S. Department of Labor Headquarters Building, Washington, D.C. Contact: Karen M. Finnegan, (FTS) 724-7402. No charge.

Office of Legal Education: The Freedom of Information Act for Attorneys and Access Professionals, **January 13-14, March 10-11**, 10th and Pennsylvania Ave., N.W., Washington, D.C. Contact: John C. Summers, (FTS) 633-4104 or 673-6372. No charge.

Office of Information and Privacy: Special FOIA Seminar for Law Enforcement Agencies, **February 4**, FBI Headquarters Building, Washington, D.C. Contact: Karen M. Finnegan, (FTS) 724-7402. No charge.

OPM

Boston Region Training Center: Implementation of the Privacy and Freedom of Information Acts, **November 24-25**, U.S. Custom House, Boston, MA. Contact: Daniel J. Buckley, (FTS) 223-5786. Cost: $225.

New York Region Training Center: Freedom of Information and Privacy Acts Workshop for Administrative and Secretarial Personnel, **March 23-24**, 26 Federal Plaza, New York, NY. Contact: Daniel Parker, (FTS) 264-8431. Cost: $200.

New York Region Training Center: Freedom of Information and Privacy Acts Workshop, **March 25-26**, 26 Federal Plaza, New York, NY. Contact: Daniel Parker, (FTS) 264-8431. Cost: $200.

Philadelphia Region Training Center: Freedom of Information and Privacy, **January 15-16**, Federal Building, Philadelphia, PA. Contact: Andrew F. Jardin, (FTS) 597-4442. Cost: $160.

Atlanta Region Training Center: Freedom of Information/Privacy Acts Workshop, **December 8-9**, Post Office Building, Vicksburg, MS. Contact: Carol B. Higbie, (FTS) 242-3488. Cost: $170.

Atlanta Region Training Center: Freedom of Information/Privacy Acts Workshop, **March 12-13**, Federal Building, Norfolk, VA. Contact: M. David Burt, (FTS) 827-3383. Cost: $170.

Dallas Region Training Center: Freedom of Information/Privacy Act, **January 6-7**, Albuquerque, NM. Contact: Yvonne Lindholm, (FTS) 729-8241. Cost: $180.

Center for Communications and Administrative Management, Administrative Management Training Institute: FOIA and Privacy Act Workshop for Administrative and Secretarial Personnel, **January 7-8**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-6047. Cost: $225.

Center for Communications and Administrative Management, Administrative Management Training Institute: Successful Implementation of the Freedom of Information Act and the Privacy Act, **March 9-10**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-6047. Cost: $225.

USDA GRADUATE SCHOOL

Implementation of the Freedom of Information and Privacy Acts, **March 4-5**, 600 Maryland Ave., S.W., Washington, D.C. Contact: Clinton W. Anderson, (FTS) 447-3247. Cost: $185.

The Freedom of Information Act and the Privacy Act, a correspondence program available to begin at any time. Contact: Correspondence Study Program Division, (FTS) 447-7123. Cost: $128 (if paid by check or charge) or $134 (if paid by purchase order).

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U.S. Department of Justice
Office of Legal Policy
Office of Information and Privacy

Vol. VII, No. 4
Fall 1986

FOIA UPDATE

FOIA Reform Legislation Enacted

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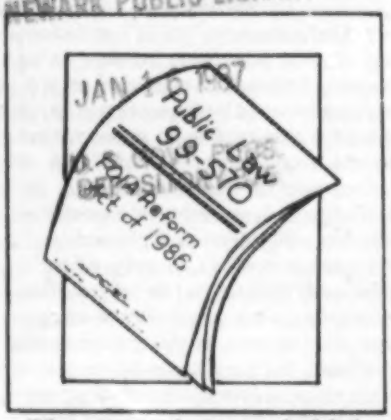

In a relatively sudden development after years of legislative deliberation, Congress passed major FOIA reform legislation shortly before adjourning in October.

Entitled the "Freedom of Information Reform Act of 1986," the legislation amends the FOIA to provide broader exemption protection for law enforcement information, plus new law enforcement record exclusions, and also creates a new fee and fee waiver structure. Signed into law by the President on October 27 as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, its law enforcement provisions became effective immediately, but its fee provisions will not become effective until next spring.

The FOIA Reform Act of 1986 contains all of the modifications to the FOIA's law enforcement exemption (Exemption 7) that had been sought by the Department of Justice over the years, including a significant lessening of the exemption's overall harm standard. In this regard, it is almost identical to that part of S. 774—the FOIA reform bill that passed the Senate, but not the House, in the previous Congress.

The Act's new record exclusion provisions extend beyond any regular exemption protection by permitting agencies, under certain special circumstances, to treat existing records as not subject to the FOIA at all. Located in new subsection (c) of the statute, these exclusions apply only in specifically described situations—involving ongoing proceedings, informant protection, or terrorism or foreign intelligence matters—in which exemption protection alone would not always be adequate.

Additionally, the Reform Act revises the FOIA's fee and fee waiver provisions to establish a multi-tiered structure for the assessment of FOIA fees. For the first time, it will allow agencies to charge the costs of actual document review, wherever requests are made for commercial purposes. All requesters will be subject to the more standard FOIA fees according to the categories in which they fall, with requesters still entitled to seek a complete waiver of fees under a revised general fee waiver standard.

Passage of this amendment package culminates years of effort by the Department of Justice to obtain legislative relief from the FOIA for federal law enforcement agencies. These efforts were spearheaded by Senator Orrin Hatch (R. Utah), Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, with the bipartisan assistance of Senators Patrick Leahy (D. Vt.) and Dennis DeConcini (D. Ariz.) of that subcommittee.

Despite extensive evidence showing the need for greater law enforcement record protection, including repeated testimony by FBI Director William H. Webster, however, it was not possible to move such FOIA reform legislation through the counterpart subcommittee in the House of Representatives. In fact, as time passed, a "counter-reform" effort was launched by those who sought to make the FOIA's requirements more stringent in many ways.

As the 99th Congress drew to a close, though, the prospective enactment of omnibus anti-drug legislation presented a rare opportunity for achieving related FOIA reform. Seizing this opportunity, Senator Hatch injected into the anti-drug bill the law enforcement provisions of the FOIA reform bill (S. 774) which previously had passed the Senate. This triggered intensive FOIA reform deliberations by congressional negotiators and other interested parties as the legislative session neared adjournment.

What emerged was a legislative package that comprehensively addressed the need for law enforcement FOIA reform without unduly burdening federal agencies with the many procedural requirements that opponents of FOIA reform had sought. Remarked Assistant Attorney General Stephen J. Markman upon the conclusion of this process: "We are quite pleased to have been able to obtain, through the leadership of Senator Hatch and others, such a valuable amendment package at this time. The strength of its much-needed law enforcement reforms will make whatever fee adjustments it requires entirely worthwhile."

Highlights of the Reform Act's changes and additions to the FOIA are as follows:

Exemption 7

- The threshold language of Exemption 7 is broadened to encompass both "records or information compiled for law enforcement purposes," a formulation which also drops the former requirement that the records be "investigatory" in character.
- The exemption's harm standard is considerably lessened, from "would" to "could reasonably be expected to," under Exemption 7(A) (protecting ongoing proceedings), Exemption 7(C) (per-

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The four center pages of this issue contain the full text of the FOIA in its amended form. Also, page two contains the text of the special Presidential Statement issued upon enactment of the law.

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. . . FOIA Reform Signed Into Law

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sonal privacy), Exemption 7(D) (law enforcement sources) and Exemption 7(F) (physical safety).

- Exemption 7(D) is reworded to expressly provide a greater range of source protection.
- Exemption 7(E) is expanded to cover prosecutorial techniques and law enforcement guidelines.
- Exemption 7(F) is broadened to extend its protection to any individual.

Exclusions

- Under the new "(c)(1)" exclusion, any agency possessing records of an ongoing criminal investigation or proceeding (covered by Exemption 7(A), as amended) can treat them as not subject to the requirements of the FOIA if "disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings." An agency may do so only where it reasonably believes that the subject of the proceeding is not aware of its pendency, and only so long as that circumstance continues, but it can apply this exclusion even where an investigation involves only "a possible violation of criminal law."
- Under the "(c)(2)" exclusion, all criminal law enforcement agencies may likewise exclude informant records to resist targeted efforts by third parties to ferret out informants.
- Under the "(c)(3)" exclusion, the FBI is empowered to exclude records pertaining to foreign intelligence, counterintelligence, or international terrorism whenever the existence of the records is a classified fact.

Fees and Fee Waivers

- Agencies will be able to charge the costs of reviewing documents for the purposes of applying FOIA exemptions, wherever records are sought "for commercial use."
- Agencies will not be able to charge search fees to educational or noncommercial scientific institutions or news media requesters.
- The general fee waiver standard will provide for waivers where disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."
- Noncommercial requesters will be entitled without charge to two hours of search and 100 pages of duplication per request.
- An agency will not be able to require advance payment of a fee unless the requester's prior failure to pay a fee makes such a deposit warranted or unless the fee exceeds $250.
- Fee waiver issues will be adjudicated in court according to a *de novo* standard of review, but the scope of such review will be limited to the administrative record created by the agency.

The Reform Act provides for the immediate applicability of all of its law enforcement provisions, as of October 27, 1986, including to "any requests" and "any civil action pending on such date." Pub. L. No. 99-570, §1804(a). The new fee and fee waiver provisions, however, do not become effective until 180 days after that date, April 25, 1987. *See* Pub. L. No. 99-570, §1804(b). (A copy of the FOIA in its amended form, with interlineations showing the exact changes made, together with the full text of this "effective date" provision, can be found at pages 3-6 of this *FOIA Update*.)

In accordance with the mandate of the Reform Act, the Office of Management and Budget will promulgate governmentwide guidelines for the assessment of future fees under the FOIA, which should in turn be the basis for new agency fee regulations. The Department of Justice will promulgate new governmentwide guidance addressing the making of fee waiver determinations under the statute's new fee waiver standard that will come into effect on April 25. Additionally, the Department is preparing a governmentwide guidance memorandum on the application of the new law enforcement provisions.

Below is the text of the "signing statement" issued upon President Reagan's signing of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, in which he singled out its FOIA reform provisions for special attention:

As I stated in my remarks at the signing ceremony for this bill, I am pleased to sign the Anti-Drug Abuse Act of 1986.

One other matter concerning the Act is worthy of note. This Act contains several important provisions reforming the Freedom of Information Act (FOIA) that will considerably enhance the ability of Federal law enforcement agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration to combat drug offenders and other criminals. My Administration has been seeking such reforms since 1981.

These FOIA reforms substantially broaden the law enforcement exemptions in that Act, thereby increasing significantly the authority of Federal agencies to withhold sensitive law enforcement documents in their files. The statutory language changes make clear, for example, that any Federal law enforcement information relating to pending investigations or confidential sources may be withheld if its disclosure could reasonably be expected to cause an identified harm. The Act also includes, for the first time, special exclusions whereby certain law enforcement records would no longer be subject to the requirements of the FOIA under particularly sensitive, specified circumstances.

Additionally, this Act makes several changes with respect to the charging of fees under the FOIA. Agencies will now be able to charge and recover the full costs of processing requests for information under the FOIA, consistent with the Federal user fee concept, in the large number of cases in which FOIA requests are made for "commercial" purposes, a term that has been broadly construed in other contexts of the FOIA. At the same time, the Act will somewhat limit the fees applicable to noncommercial educational or scientific institutions and to bona fide representatives of established news media outlets. It is important that no such special treatment is accorded to organizations engaged in the business of reselling government records or information.

Finally, the bill improves the standard governing the general waiver of FOIA fees, by mandating that such waivers be granted only where it is established that disclosure is in the "public interest" because it is likely to "contribute significantly to public understanding" of the operations or activities of the government. This standard is intended to focus upon benefits to the public at large, rather than upon the interest of a particular segment of the public, and thus clarifies the type of public interest to be advanced.

The Freedom of Information Act
5 U.S.C. §552, As Amended By
The Freedom of Information Reform Act of 1986
Public Law No. 99-570, §§1801-1804

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying ~~a uniform~~ the schedule of fees applicable to ~~all constituent units of such agency.~~ the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such

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schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. ~~Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.~~

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.] Repealed. Pub. L. No. 98-620, §402(2), 98 Stat. 3335, 3357 (1984).

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative

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authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having a substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) ~~investigatory~~ records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ~~would~~ (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, ~~confidential~~ information furnished ~~only~~ by ~~the~~ a confidential source, (E) would disclose ~~investigative~~ techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of ~~law enforcement personnel~~ any individual;

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(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

~~(c)~~ (d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

~~(d)~~ (e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

~~(e)~~ (f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

* * * * *

Section 1804. Effective Dates [not to be codified].

(a) The amendments made by section 1802 [the modification of Exemption 7 and the addition of the new subsection (c)] shall be effective on the date of enactment of this Act [October 27, 1986], and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

(b)(1) The amendments made by section 1803 [the new fee and fee waiver provisions] shall be effective 180 days after the date of the enactment of this Act [April 25, 1987], except that regulations to implement such amendments shall be promulgated by such 180th day.

(2) The amendments made by section 1803 shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.

***National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525 (D.C. Cir. 1986)—*affirming* 602 F. Supp. 469 (D.D.C. 1984).**

In the first appellate decision to apply the Exemption 2 protection recognized in *Crooker v. BATF*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc), to records entirely unrelated to law enforcement, the D.C. Circuit has affirmed the Customs Service's withholding of its "crediting plans." The court of appeals noted that these plans "in effect constitute a roadmap" designed to assist agency personnel in evaluating the qualifications of agency job applicants, and that each plan "outlines the experience level and the demonstrated abilities required for a particular position" and thus sets forth precise standards by which to measure qualifications. Observing that some applicants might "embellish—or perhaps even fabricate—their backgrounds to suit the appropriate crediting plan," it found that disclosure would "create[ ] a significant risk that the [agency's] applicant evaluation program would be seriously compromised." Although the Customs Service could not identify a specific regulation or statute that would be thwarted by disclosure, the D.C. Circuit nevertheless held that the "risk of circumvention" requirement of *Crooker* was satisfied where, as here, release would render the documents "operationally useless." It declared that it was "entirely consistent with sound policy objectives and common sense to conclude that Congress did not intend to mandate the release of evaluative criteria that are commonly treated as confidential by personnel departments in both the public and private sectors."

***Bevis v. Department of State*, 801 F.2d 1386 (D.C. Cir. 1986).**

In the first appellate decision to recognize the applicability of Exemption 7(A) to investigatory records compiled for foreign law enforcement purposes, the D.C. Circuit has ruled that the potential for future proceedings in El Salvador against those responsible for the murders of U.S. citizens is sufficient to prevent the release of FBI investigative records compiled at the request of the Salvadoran government. Relying on the "logic" as well as the language of the FOIA, the court of appeals found "no distinction between foreign and domestic enforcement purposes" under Exemption 7(A), holding also that even though some of those involved were no longer subject to prosecution, the prospect of further proceedings against some suspects was sufficient for exemption protection. However, reemphasizing its admonition in *Crooker v. BATF*, 789 F.2d 64, 67 (D.C. Cir. 1986), that "generic" categories of documents withheld under Exemption 7(A) must "allow[ ] the court to trace a rational link between the nature of the document and the alleged likely interference," it remanded the case for the FBI to reformulate its "generic" categories into functional groups and describe how release could cause interference. Finally, the FBI was instructed to ascertain, "to the extent feasible," whether any data in its files had been made public in Salvadoran court proceedings.

***Greenberg v. FDA*, 803 F.2d 1213 (D.C. Cir. 1986).**

In a curious procedural twist, the U.S. Court of Appeals for the D.C. Circuit, acting on the basis of the death of one of its members, vacated its previous decision which had upheld the protection of a customer list under Exemption 4 (see *FOIA Update*, Fall 1985, at 5), appointed a new judge to reconsider the case and then, in a split decision by the reconstituted panel, reversed and remanded the case on procedural grounds. The majority of the new panel held that the requester had shown the existence of a genuine issue of material fact, *i.e.*, whether disclosure of the customer list would cause competitive harm to its submitter, and that summary judgment was therefore inappropriate. Proclaiming that summary judgment is a "drastic step which should not be taken lightly" it held that the requester had sufficiently placed in question certain factual aspects of the economic injury threatened by disclosure. In a strong dissent based upon his original majority opinion, Circuit Judge Robert H. Bork declared that it "strains credulity to argue that [the submitter] would go to such enormous trouble and expense to safeguard its customer list if that information were not extremely valuable." A petition for rehearing *en banc* has been filed.

***Dirksen v. HHS*, 803 F.2d 1456 (9th Cir. 1986).**

Recognizing that release of Blue Cross claims processing guidelines would permit the circumvention of the Health Care Financing Administration's payment review procedures, a divided panel of the U.S. Court of Appeals for the Ninth Circuit held that the "auditing function" of the guidelines "puts them in the category of exempt law enforcement material" protected under Exemption 2. It characterized the guidelines as "an internal claims processing blueprint," and noted that they enable Blue Cross to "uniformly and expeditiously" process millions of Medicare claims annually for HCFA. Observing that the guidelines determine "which claims are to be automatically granted, denied, or reviewed in more detail," the Ninth Circuit found that their disclosure would enable medical care providers to easily "fit their claims into the 'automatically granted' category." Thus, it concluded, release of the guidelines to the requester, a physician who regularly files Medicare claims, would cause them to "lose the utility they were intended to provide."

***Falzone v. Department of the Navy*, Civil No. 85-3862 (D.D.C. Oct. 16, 1986), *reconsideration denied* (D.D.C. Nov. 21, 1986).**

In another decision on the disclosability of "mailing list" information, U.S. District Court Judge Charles R. Richey has held that the names and mailing addresses of commissioned naval officers scheduled for reassignment to Pensacola, Florida—but currently serving overseas or with classified, sensitive or deployable units—are protectible under Exemption 6. Judge Richey found that the plaintiff's intended use of the list —"to identify potential real estate clients"—hardly weighed in favor of disclosure. On the other side of the balance, though, he found "substantial" privacy interests to be protected, not only against "unwanted solicitations," but because the subjects of the request "are potential targets of threats and terrorist attacks." In denying the requester's motion for reconsideration, Judge Richey specifically distinguished *Hopkins v. Department of the Navy*, Civil No. 84-1868 (D.D.C. Feb. 5, 1985) (finding no protectible privacy interest in names and duty stations of marines currently stationed at Quantico, Virginia), saying that the "potential for threats and terrorist attacks against servicemen stationed at Quantico is small in contrast to the officers whose names and addresses are being withheld here."

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Office of Legal Education: The Freedom of Information Act for Attorneys and Access Professionals, **January 13-14, March 10-11, May 26-27**, 10th and Pennsylvania Ave., N.W., Washington, D.C. Contact: John C. Summers, (FTS) 633-4104. No charge.

Office of Information and Privacy: Special FOIA Seminar for Law Enforcement Agencies, **February 4**, FBI Headquarters Building, Washington, D.C. Contact: Karen M. Finnegan, (FTS) 724-7402 or 633-3642. No charge.

Office of Legal Education: Introduction to the Freedom of Information Act for Non-Specialists, 8:30 a.m. to 1 p.m., **April 14**, 10th and Pennsylvania Ave., N.W., Washington, D.C. Contact: John C. Summers, (FTS) 633-4104. No charge.

OFFICE OF PERSONNEL MANAGEMENT

Boston Region Training Center: Freedom of Information and Privacy Acts Workshop, **April 23-24**, New Federal Office Building, Boston, MA. Contact: Daniel J. Buckley, (FTS) 565-6500. Cost: $225.

New York Region Training Center: Freedom of Information and Privacy Acts Workshop for Administrative and Secretarial Personnel, **March 23-24**, 26 Federal Plaza, New York, NY. Contact: Daniel Parker, (FTS) 264-8431. Cost: $200.

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Dallas Region Training Center: Freedom of Information/Privacy Act, **January 6-7**, Albuquerque, NM; **April 30-May 1**, Dallas, TX. Contact: Yvonne Lindholm, (FTS) 729-8241. Cost: $180.

Center for Communications and Administrative Management, Administrative Management Training Institute: FOIA and Privacy Act Workshop for Administrative and Secretarial Personnel, **January 7-8, May 12-13**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-6047. Cost: $225.

Center for Communications and Administrative Management, Administrative Management Training Institute: Successful Implementation of the Freedom of Information Act and the Privacy Act, **March 9-10, May 14-15**, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C. Contact: Cassandra Saunders, (FTS) 632-6047. Cost: $225.

USDA GRADUATE SCHOOL

Implementation of the Freedom of Information and Privacy Acts, **March 4-5**, 600 Maryland Ave., S.W., Washington, D.C. Contact: Clinton W. Anderson, (FTS) 447-3247. Cost: $185.

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The Freedom of Information Act and the Privacy Act, a correspondence program available to begin at any time. Contact: Correspondence Study Program Division, (FTS) 447-7123. Cost: $128 (if paid by check or charge) or $134 (if paid by purchase order).

NON-GOVERNMENT

ACLU's Twelfth Annual Seminar on the Freedom of Information Act and the Privacy Act, **February 26-27**, Marvin Center, George Washington University, Washington, D.C. Contact: Catherine Cameron, (202) 544-1681. Cost: $275 (pre-registration) or $295 (at the door).

FOIA UPDATE

Published quarterly by the Office of Information and Privacy, Office of Legal Policy, U.S. Department of Justice, Washington, D.C. 20530, (FTS) 724-7400.

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